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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,
Petitioners

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Edmund J. Wood
WOOD & JONES, P.S.
1201 Westlake Center
Seattle, WA 98101-16 25
(206) 623-4382

J. Michael Hennigan
Richard T. Colman
Jerrold J. Ganzfried
(Counsel of Record)
David S. Sager
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Attorneys for Imagineering Inc.
and Knighten Bros. Construction, Inc.

QUESTION PRESENTED

Both the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), and the Clayton Act, 15 U.S.C. § 15, confer standing on a private party "injured in his business or property by reason of" a violation of the respective statutes. The Ninth Circuit has erected barriers to standing under RICO that do not exist under the antitrust laws. The question presented is:

Whether the requirements for pleading standing to maintain a civil RICO action are more restrictive than those under the identical language of the Clayton Act, upon which RICO was modeled.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court of appeals are identified in the caption. Pursuant to Supreme Court Rule 29.1, petitioners state that there are no parent or subsidiary companies to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Imagineering, Inc. and Knighten Brothers Construction Co. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1-A22) is reported at 976 F.2d 1303. The opinions of the district court (App., *infra*, A25-A35 and A36-A51) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1992. App., *infra*, A23. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c) (1988), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 39.19070 of the Washington Revised Code, Wash. Rev. Code § 39.19070 (1991), provides:

> It is the intent of this chapter that the goals established under this chapter for participation by minority and women-own and controlled business

be achievable. If necessary to accomplish this intent, contracts shall be awarded to the next lowest bidder, or all bids may be rejected and new bids obtained, if the lowest bidder does not meet the goals established for a particular contract under this chapter. The dollar value of the total contract used for the calculation of the specific contract goal may be increased or decreased to reflect executed change orders. An apparent low-bidder must be in compliance with the contract provisions required under this chapter as a condition precedent to the granting of a notice of award by any state agency or educational institution.

INTRODUCTION AND STATEMENT

1. Federal, state and local set-aside regulations require prime contractors to engage minority-business enterprises ("MBEs") and women-business enterprises ("WBEs") (collectively "MWBEs") as subcontractors or joint venture partners on public works construction projects. *See generally* 49 C.F.R. § 23 (1991); Wash. Rev. Code § 39.19 (1991) *et seq.* and Wash. Admin. Code § 326; Chpt. 20.46, Seattle Ordinances. App., *infra*, A2. Regulations require prime contractor bids to include a list of qualified MWBE subcontractors or joint venture partners and a description of the type and dollar amount of work that MWBEs will perform. *Id.* The successful bidder receives a Condition of Award letter that makes the participation of the designated MWBEs a condition of the contract between the successful bidder and the government agency. *Id.*

2. Respondents Kiewit Pacific Company, Kiewit Construction Company and Peter Kiewit Sons', Inc. (collectively "Kiewit") are prime contractors that developed and implemented a scheme unlawfully to obtain and perform public construction contracts while creating the illusion of compliance with the set-aside regulations. App., *infra*, A2-A3. Kiewit regularly employed Global Consultants/Construction ("Global") and Seaway Construction, Inc. ("Seaway") as sham MWBEs through various ruses, such as "conduits," "fronts," and "pass-throughs." *Id.* at A3.[1]

In many instances, these sham participants do not earn a legitimate profit from the contract. *Id.* Rather, their principals are paid a fee for allowing the companies to be used in respondents' scheme to preclude genuine MWBE participation in public works construction projects. *Id.* The fees paid to the sham MWBEs are much smaller than the amounts the regulations require to be paid to qualified MWBEs, thus enabling Kiewit also to exclude actual MWBE participation by underbidding complying contractors. *Id.* at A5. The scheme likewise permits Kiewit to earn higher profits than it would obtain if it complied with the set-aside regulations. *Id.*

3. Petitioners are MWBEs that were excluded by Kiewit's scheme from participating in public works

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[1] A "conduit" is an MWBE that is a subcontractor in name only; the work actually is performed by the prime contractor. *Id.* A "front" is a company that purports to be an MWBE, through trust agreements or similar arrangements, but is not in fact a minority or women-owned business enterprise. *Id.* A "pass-through" is an MWBE that merely buys goods to be counted toward fulfillment of MWBE goals, but performs no contract work. *Id.*

construction projects governed by the relevant set-aside regulations. *Id.* at A4. Petitioner Imagineering, Inc. ("Imagineering") is a certified WBE engaged in the business of structural metal fabrication. *Id.* Petitioner Knighten Brothers Construction Co. ("Knighten Brothers") is an MBE certified to perform excavation, concrete and pipeline work. In numerous instances, petitioners were identified as subcontractors on the lowest bid in compliance with the set-aside regulations but were excluded from participating in those public works projects as a direct consequence of Kiewit's unlawful scheme. *Id.* Kiewit obtained at least thirteen public works contracts without complying with the set-aside regulations. *Id.* at A39. Moreover, Kiewit concealed its unlawful scheme by bribing public officials and engaging in a pattern of extortion, and implemented its conduit scheme by using threats and intimidation. *Id.*

4. To remedy their exclusion from public works construction projects as a result of Kiewit's fraudulent scheme, petitioners filed a class action lawsuit in the United States District Court for the District of Washington. The complaint alleged that Kiewit's actions injured the business or property of all class members in violation of RICO. *Id.* at A3. In granting respondents' Rule 12 motion, the district court dismissed the complaint for lack of RICO standing, without leave to amend, because petitioners did not specify the individual projects on which they were likely to receive subcontracts. *Id.* at A36-A51.

The district court subsequently permitted petitioners to file an amended complaint. App., *infra*, A3.[2] The amended complaint alleged that federal, state and local set-aside regulations require that projects be awarded only to prime contractors who comply with the regulations, and that each named plaintiff was an MWBE subcontractor for the lowest complying prime contractor on at least one project improperly awarded to Kiewit. *Id.* at A3-A4.

Specifically, Imagineering was designated as a WBE on the West Seattle Low Bridge project by Guy F. Atkinson Construction Company, which was the complying prime contractor with the lowest bid on that project. *Id.* The contract for that project was awarded to Kiewit-Global, a joint venture that purported to satisfy the set-

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[2] This case was originally filed as a class action on behalf of approximately 700 MWBEs certified in the construction trades at any time after January 1, 1982 (excluding those MWBEs acting in concert with Kiewit). App., *infra*, A26. The district court dismissed the complaint without ruling on class certification. In the amended complaint, petitioners adhered to the directive of the district court and limited the class to approximately 50-75 MWBEs that were specifically identified on project bids by the lowest-bidding prime contractor that complied with the set-aside. *Id.* at A4, A26.

The amended complaint also alleged civil rights violations, 42 U.S.C. §§ 1981, 1982, 1985(3) (1988), and claims under Washington state law. *Id.* at A2. Petitioners' civil rights claims were based on allegations that respondents purposefully deprived them of their property rights to bid contracts because of the race of the owners. With respect to their state law claim, petitioners alleged that respondents wrongfully and illegally obtained and retained profits from projects as constructive trustees for petitioners.

The jurisdiction of the district court rested on 18 U.S.C. § 1964(c), 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1343(a), and pendent jurisdiction.

aside regulations by including a front as a joint venture partner. *Id.* Similarly, Knighten Brothers was designated as an MBE on the Cedar Falls Dam project by prime contractor Morrison-Knudsen, the complying prime contractor with the lowest bid. *Id.* The contract for that project was awarded to Kiewit Pacific, a prime contractor that used sham MWBEs in its bid. *Id.* Because of Kiewit's unlawful scheme, Imagineering and Knighten Brothers lost the profits that they would have earned on these projects and which were specifically allocated to MWBEs by the applicable regulations. *Id.* at A5. Furthermore, because of Kiewit's unlawful conduct, Imagineering, Knighten Brothers, and all certified MWBEs identified as subcontractors or joint venture partners by the lowest-bidding complying prime contractors, were excluded from the public works construction market. *Id.*

Prior to any discovery, the district court granted respondents' Rule 12 motion and dismissed the amended complaint for lack of RICO standing. *Id.* at A25-A35. The court reasoned that petitioners had failed to set forth a reasonable business expectancy in particular subcontracts and thus could not establish that they were injured by reason of defendants' RICO violation. *Id.* at A27-A29. The district court dismissed plaintiffs' civil rights and pendent claims on similar grounds. *Id.* at A29-A35.

5. The United States Court of Appeals for the Ninth Circuit affirmed. App., *infra*, A1-A22. The court of appeals analyzed the issues of RICO standing and proximate causation separately. On the issue of standing, the court focused on whether petitioners had, at the pleading stage, "established" sufficient injury. *Id.* at A14. The court held that despite the allegation that MWBEs had been excluded from participating in public works

projects, the complaint failed to allege "proof of concrete financial loss." *Id.* at A13. "[E]ven if the type of injury alleged by the MWBEs could be compensable," the court explained, "it is not at all clear that these MWBEs suffered such an injury." *Id.* at A14. The court further stated that "[e]ven if we assume that the MWBE plaintiffs' prime contractors would have received the contracts and they were obligated to award Imagineering and Knighten Brothers the subcontracting work merely on the basis of 'designating' them in the bids, there is no guarantee that the WBE or MBE subcontractor chosen would not be substituted during the pendency of the contract." *Id.* at A15. Finally, the court of appeals noted that "[i]t is impossible to determine from the amended complaint whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits." *Id.*[3]

Turning to the issue of proximate cause, the court of appeals concluded that "[i]t was the intervening inability of the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries." *Id.* at A18. Therefore, the court held, petitioners' injury was too remote, as a matter of law, to confer standing. Rather than addressing the possibility that petitioners suffered a distinct injury that was not duplicative of any injury that may have been suffered by prime contractors, as the amended complaint alleged, the court focused on the notion that MWBE

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[3] In fact, petitioners pleaded both, having been directed by the district court to allege specific contracts that petitioners lost as a result of Kiewit's unlawful scheme. *Id.* at A43.

subcontracts were contingent on the award of particular contracts to prime contractors. *Id.*[4]

REASONS FOR GRANTING THE PETITION

The issue of standing under the RICO statute is an important and recurrent question that has proven enigmatic for the lower courts, as evidenced by this Court's exercise of its certiorari jurisdiction twice in recent years to address aspects of the issue. *Sedima, S.P.R.L., v. Imrex Co.*, 473 U.S. 479 (1985); *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). Since the courts of appeals remain in conflict, review by this Court is again necessary to resolve important continuing questions regarding the pleading requirements for RICO.

Both Section 1964(c) of RICO and Section 4 of the Clayton Act create a private right of action in favor of a person "injured in his business or property by reason of" a violation of the respective statutes. As this Court instructed in *Holmes*, 112 S. Ct. at 1317, the RICO statute was directly modeled on the Clayton Act, and in using the same words Congress "intended them to have the same meaning that courts had already given them." *Id.* at 1318. Yet, in the decision below, the Ninth Circuit sharply limited the scope of RICO, employing a standing analysis that is significantly more restrictive than that employed under the antitrust analogue and which conflicts with the decisions of this Court and of other courts of appeals. Review by this Court is warranted to resolve this conflict and to provide guidance on the requisite pleading

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[4] The court affirmed dismissal of the civil rights and state law claims. App., *infra*, A19-A22. This petition raises only the RICO claims.

requirements to assert standing for RICO claims. Unless the decision below is reversed, unlawful conduct in violation of RICO and set-aside regulations will go unpunished and undeterred, and the injuries suffered by the very parties these statutes are intended to benefit will go unremedied.

1. Although RICO and the Clayton Act share the "injured in his business or property" language, the Ninth Circuit has erected a substantial new barrier to RICO standing that does not exist under the antitrust laws. In the decision below, the court dismissed petitioners' complaint alleging loss of business and business opportunity because "[a] showing of 'injury' requires proof of concrete financial loss." App., *infra*, A13. The decision below adopts a standard that limits RICO standing to plaintiffs who can prove out-of-pocket losses paid out as a result of racketeering activity. Because this standard eliminates loss of business opportunity or business expectancy from redress under RICO, the decision below is incompatible with RICO decisions of other courts of appeals and with well-settled standing principles announced in antitrust cases applying identical statutory language.

A plaintiff claiming antitrust injury as a result of economic exclusion from a particular market is not required to identify specific business losses to establish standing. For instance, in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 727, 730 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987), the Eighth Circuit held that loss of a business opportunity due to unlawful conduct constitutes both "injury to business" and "a protectable interest under the federal antitrust

law . . . ."[5] The court of appeals concluded that "an unestablished business can recover future lost profits under the federal antitrust laws if a sufficiently advanced state of preparation for entering a market has been achieved." *Id.* at 727-28. Similarly, the Ninth Circuit has "adopted the view that a party 'who has taken substantial demonstrable steps to enter an industry and who is thwarted in that purpose by antitrust violations, has suffered a possible ascertainable loss.'" *Parks v. Watson*, 716 F.2d 646, 659-60 (9th Cir. 1983) (quoting *Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979)).

In contrast to the injury requirement for standing in antitrust cases, the standard adopted by the Ninth Circuit in the decision below requires proof of concrete financial loss. The extent to which the Ninth Circuit denies RICO standing in circumstances where analogous antitrust standing would be clear is evident from the court's conclusion that petitioners had failed to allege injury because "there is no guarantee that the WBE or MBE subcontractor chosen would not be substituted during the pendency of the contract." App., *infra*, A15. This standard effectively reads the "injured in his business" provision out

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[5] In *Central Telecommunications*, an unsuccessful franchise applicant sued the incumbent franchisee. The Eighth Circuit affirmed the verdict for the plaintiff and held that plaintiff had established injury to its business. Plaintiff "had made sufficient preparations to enter the cable television business to recover for injury to 'business' under section 4 of the Clayton Act." *Id.* at 729.

of the RICO statute and limits standing to plaintiffs who "establish" a lost "property interest."[6]

In addition to being more restrictive, the Ninth Circuit's holding also conflicts with the decisions of this Court and of other courts of appeals that have specifically held that loss of business opportunity is sufficient to confer RICO standing. In *Sedima, S.P.R.L., v. Imrex Co.*, this Court stated that the type of damages that may be recovered under RICO "include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery." 473 U.S. at 497 n.15.[7] If anything, the injury requirement under RICO is actually less restrictive; whereas a plaintiff must show "antitrust injury" under the Sherman Act, there is no "racketeering injury" requirement under RICO. *Id.* at 495-97. Under the standard adopted by the Ninth Circuit, however, competitive injury is not compensable under RICO. As articulated in the decision below, neither allegations of competitive harm resulting

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[6] In dismissing petitioners' amended complaint, the district court held that "[p]laintiffs' expectation of receiving subcontracts does not amount to a property right," App., *infra*, A33. In affirming, the court of appeals cited *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.), *cert. denied*, 61 U.S.L.W. 3418 (1992) (citing *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990)), for the proposition that a showing of injury requires proof of concrete financial loss. App., *infra*, A13. As the Ninth Circuit made clear in *Oscar*, however, "[t]he lesson of *Berg* is that injuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." 965 F.2d at 785. The injury claimed by petitioners is an injury to their business.

[7] The cited portion of the *Sedima* dissent includes the following example: competitors of a business that engages in racketeering activity to enhance profits can bring "civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts." 473 U.S. at 522.

from plaintiffs' exclusion from public works contracts, nor allegations of specific contracts that were lost as a result of defendant's sham MWBE scheme are sufficient to satisfy the injury requirement for RICO standing. *See* App., *infra*, A14-A15.

In *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F. 2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990), plaintiff alleged that it lost a bid on a Nigerian defense contract because defendants had bribed Nigerian government officials. The Third Circuit held that plaintiff sufficiently had alleged injury for purposes of standing, despite defendants' argument that plaintiff had failed to plead "any facts which would establish, if true, that but for the defendants' illegal conduct it would have received the . . . contract." *Id.* at 1066. The court of appeals stated that "[t]o have standing to assert a civil RICO claim, [plaintiff] need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation." *Id.* at 1067. Plaintiff's allegations of injury resulting from defendants' bribery scheme satisfied this standard. Under the Ninth Circuit's standard, however, such allegations are not sufficient.[8]

At the very least, the question whether the lowest complying bidder would have received a contract in the absence of respondents' misconduct is an issue of fact for the jury, not subject to disposition on the pleadings, as the court of appeals held. In contrast, the Eighth Circuit held

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[8] Petitioners have alleged that Kiewit implemented, perpetuated and concealed its unlawful scheme through a pattern of racketeering activity that includes bribery and extortion of public officials. App., *infra*, A4-A5, A39.

in *Iconco v. Jensen Construction Co.*, 622 F. 2d 1291, 1300 (8th Cir. 1980) that:

> The more logical approach, in our view, is to put the unsuccessful bidder to its proof; if it proves by a preponderance of the evidence that it would have received the contract award absent the successful bidder's wrongdoing, we find no persuasive reasons why recovery should be denied.[9]

In granting defendant's motion to dismiss, the Ninth Circuit has adopted a standard under which allegations of competitive injury are insufficient to confer standing in RICO cases, in conflict with longstanding precedent in antitrust cases under identical statutory language and in conflict with decisions of this Court and other courts of appeals in RICO cases.[10]

2. Expressly relying on RICO's civil action analogue in the antitrust laws, this Court recently confirmed that

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[9] District courts addressing this issue in RICO cases arising from fraud in government contracts have reached a similar conclusion. *See Service Eng'g Co. v. Southwest Marine, Inc.*, 719 F. Supp. 1500 (N.D. Cal. 1989) (whether government would have awarded contract to next-lowest bidder is triable issue of fact); *Andersen-Myers Co. v. Roach*, 660 F. Supp. 106, 111-12 (D. Kan. 1987) (same).

[10] Indeed, in *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-301 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990), a case upon which the decision below relies, App., *infra*, A13, the Sixth Circuit observed that "in some cases expectancy damages might be appropriate." Moreover, the portion of *Fleischhauer* cited by the Ninth Circuit did not deal with standards for pleading RICO injury, but with damages calculations after liability had already been established.

RICO standing requires that a plaintiff allege not only that the defendant's violation was a "but for" cause of plaintiff's injury, but that it was the proximate cause as well. *Holmes*, 112 S. Ct. at 1317. This Court made it clear that the proximate cause analysis should be the same under both statutes. *Id.* at 1317, 1318 n.15. The court below, however, engaged in an overly restrictive reading of *Holmes* and applied a more restrictive proximate cause analysis than it applies in antitrust cases. It held that only a prime contractor can have RICO standing. This arbitrary standard limits the scope of RICO in a manner that is inconsistent with prior decisions of this Court and that conflicts with the decisions reached by other courts of appeals.

In the antitrust context, this Court has held that unlawful conduct may be the proximate cause of injury to more than one category of plaintiff without resulting in duplicative recovery. For example, in *Blue Shield v. McCready*, 457 U.S. 465, 478-79 (1982), the Court stated:

> We do not think that because the goal of the conspirators was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves, McCready's injury is rendered "remote." . . . Here the remedy [provided by section 4 of the Clayton Act] cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market . . . . Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends.

(footnote omitted). Plaintiff in *McCready* had standing because she was within that area of the economy that was endangered by the breakdown of competitive conditions resulting from defendants' scheme. *Id.* at 480-81.[11]

In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540-42 (1983), this Court acknowledged that both a prime contractor and a subcontractor would have antitrust standing to sue a defendant accused of coercing landowners to divert business from plaintiffs to nonunion contractors:

> If either [the contractors or subcontractors], or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble-damages actions against the defendants. An action on their behalf would

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[11] Much of this Court's analysis in *McCready* flows from the fact that allowing plaintiff to recover did not create any risk of duplicative recovery. *See id.* at 475. Similarly, in *Holmes*, this Court's holding that plaintiff's injury had not been proximately caused by the alleged conduct hinged, in part, on concerns with apportionment. 112 S. Ct. at 1318. The decision below is premised on the concern that recovery by plaintiffs would be duplicative of recovery by prime contractors, were they to bring an action. But a prime contractor would be able to recover only its own lost profits. The prime contractor would not be able to recover the profit expressly set aside by regulation for work performed by the subcontractor. Furthermore, in the event that prime contractors did bring suit against Kiewit, petitioners would have no cause of action against the prime contractors to recover money to which petitioners were entitled under the set-aside regulations.

> encounter none of the conceptual difficulties that encumber the Union's claim.

Id. at 541.

In *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1947 (1992), the Ninth Circuit held that consulting firms that had been excluded from the yellow page advertising market had standing under the antitrust laws.[12] With respect to the issue of proximate cause, the Ninth Circuit rejected the district court's holding that plaintiffs' injury was derivative of the injury to their clients. Though the district court reasoned that plaintiffs would suffer injury only if their clients were injured, the court of appeals noted by way of example that the consultants and their clients might have suffered different types of injury, each of which would be recoverable:

> An advertiser with a yellow pages advertising budget of $1,000 might pay that entire sum to GTE rather than use Consultants because of the inconvenience caused by GTE's refusal to let

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[12] In *Yellow Pages*, plaintiffs sought recovery under Sections 1 and 2 of the Sherman Act because of defendant's announcement that it would no longer allow consultants to order, place, and process advertisements on behalf of their client-advertisers. As a result of defendant's change in policy, the plaintiff consulting firms alleged that they lost existing contracts and suffered a decline in overall revenues. In its damages analysis, the Ninth Circuit held that the district court had applied too strict a standard in holding that the consultants' damages were speculative, and stated that the rule in the Ninth Circuit is that "[an antitrust] plaintiff [attempting to establish the amount of damages] need not negative all possible alternative explanations for his decline in profits." 951 F.2d at 1163.

> Consultants place ads with them on its behalf. Had GTE allowed Consultants to place the ads, causing the advertiser to use Consultants, it might have paid only $500 to GTE and $200 to Consultants and retained $300 itself. *The Consultants would recover the $200 in the instant suit; the advertiser might recover $300 in a subsequent suit.* From this perspective, Consultants' antitrust action presents no unusually difficult apportionment problems.

Id. at 1163 (emphasis added). In *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987), the Ninth Circuit held that both the Raiders football team and the L.A. Coliseum had antitrust standing to challenge the NFL's conduct in blocking the Raiders' move from Oakland to Los Angeles. The court discerned that each plaintiff suffered distinct, direct injury in a separate market and, therefore, the Coliseum's injury "cannot be characterized fairly as an indirect 'ripple effect.'" *Id.* *See also In re Insurance Antitrust Litig.*, 938 F.2d 919, 926 (9th Cir. 1991), *cert. granted on other grounds*, 113 S. Ct. 52 (1992) ("That the action of the reinsurers took effect through the primary insurers does not lessen the directness of these consequences which followed so closely upon the challenged conduct").

Contrary to the standard it traditionally applies in antitrust cases, the court of appeals employed a substantially more burdensome proximate cause analysis in the decision below. The court reasoned that the injury suffered by petitioners was derivative to that suffered by the prime contractors as a matter of law: "[t]he direct harm in this case runs to the prime contractors. It was the

intervening inability of the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries." App., *infra*, A18. In short, the court of appeals held that only the party most immediately related to the wrongful conduct, as determined at the pleading stage, has standing to sue under RICO.[13]

The holding below also conflicts with RICO decisions of other courts of appeals. In *Schiffels v. Kemper Financial Services*, 978 F.2d 344 (7th Cir. 1992), the Seventh Circuit held that RICO standing exists for an employee who was fired when she became aware of her employer's unlawful conspiracy. The court perceived that a key factor in determining standing is whether "the act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect." *Id.* at 350. In the present action, petitioners' exclusion from public works projects was a necessary element of defendants' conspiracy to increase

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[13] The Ninth Circuit's adoption of a most direct relationship standard for pleading proximate cause is both an arbitrary and overly restrictive limitation on RICO. One can always conjure up another potential claimant and argue that it suffered a more direct injury than the plaintiff. Indeed, such a standard invites counsel for defendants to propound creative arguments that the "most directly injured" party is someone other than the actual plaintiff. At bottom, that argument means there is never a proper plaintiff.

In the present case, Kiewit's unlawful conduit scheme was directed at MWBEs. Unlike prime contractors, MWBEs were excluded from participating in public works projects precisely because of their status as MWBEs. The scheme diverted money that was earmarked for MWBEs to Kiewit's own pockets. To deny standing to the MWBEs is to deny a remedy to those most completely and most directly injured by the conduit scheme.

their profit margin by circumventing the set-aside regulations. Accordingly, in the circumstances of this case, the Seventh Circuit would have found that petitioners have RICO standing.

The same result would obtain in the Second Circuit. In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), the court held that the creditor-plaintiff had RICO standing to recover for injuries suffered as a result of defendants' unlawful conduct, even though such conduct may have caused identical injury to the bankrupt estate. The court recognized that plaintiff and the bankrupt estate were injured by identical transactions and thus there was a potential overlap in recovery; "[t]his overlap, however, does not present a question of Bankers' standing to bring a civil RICO claim, but rather presents the question of which and how much in damages Bankers can recover under that RICO claim." *Id.* at 1101.

In *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), the court held that a subdivision association had RICO standing separate and apart from its members. In contrast to the Ninth Circuit's "most direct injury" standard for proximate cause analysis, the Eighth Circuit reasoned that "standing to pursue a RICO action exists even though the plaintiff does not allege that it was a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury." *Id.* at 472. Thus, the court of appeals rejected defendants' argument that the association lacked standing merely because it shared its injury with its members.

In direct contrast to the standard enunciated in the decision below, the Fifth Circuit has noted that "[a] requirement that the nexus between the injury and a predicate act be 'direct' may, at least in some circumstances, be overly restrictive." *Zervas v. Faulkner*, 861 F.2d 823, 833 (5th Cir. 1988). Similarly, the First Circuit has recognized that *Sedima* made it clear that "the inquiry in not whether the plaintiff has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts." *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988) (citation omitted).[14] *See also Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991) ("The harm alleged may be either 'direct' or 'indirect,' so long as it 'flows from' the predicate acts."). The Ninth Circuit has rejected that analysis in favor of a conflicting and more onerous standard that leaves respondents' plainly wrongful conduct unremedied.

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[14] In *Bass*, individual RICO claims failed because the injury alleged was sustained by the union collectively. The court of appeals recognized, however, that had plaintiffs alleged an injury sustained by themselves individually, they would have had standing. *Bass*, 838 F.2d at 12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Edmund J. Wood
WOOD & JONES, P.S.
1201 Westlake Center
Seattle, WA 98101-1625
(206) 623-4382

J. Michael Hennigan
Richard T. Colman
Jerrold J. Ganzfried
(Counsel of Record)
David S. Sager
HOWREY & SIMON
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 783-0800

Attorneys for Imagineering Inc. and Knighten Bros. Construction, Inc.

Dated: January 4, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35970

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,

Plaintiffs-Appellants

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.,

Defendants-Appellees.

DECIDED: October 7, 1992

BEFORE: EUGENE A. WRIGHT, ROBERT R. BEEZER, and EDWARD LEAVY, Circuit Judges.

LEAVY, Circuit Judge:

This case involves an appeal from the district court's dismissal of the plaintiff's complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). A plaintiff class of minority and woman-owned business enterprises ("MWBEs") appeal the dismissal of its action against Kiewit Pacific Company, Kiewit Construction Company, and Peter Kiewit Sons', Inc. ("Kiewit"), who are prime contractors, challenging an alleged scheme to evade federal and state regulations requiring prime contractors to employ MWBEs on public works construction projects by using phony MWBEs to create the appearance of compliance with the set-aside regulations. Plaintiffs alleged that the scheme violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, certain sections of the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and 1984, and Washington state law.

FACTUAL AND PROCEDURAL BACKGROUND

Federal, state, and local set-aside regulations set forth required levels of participation by MWBEs on public works construction contracts awarded to prime contractors. Prime contractors secure the required MWBE participation by subcontracting work to qualified MWBEs or by entering a joint venture agreement with one or more MWBE. In fact, prime contractor bids must include a list of MWBE subcontractors or joint venture partners and a description of the type and dollar amount of work that the MWBE will perform if its bid is selected. The successful bidder receives a Condition of Award letter that makes the participation of the designated MWBEs a condition of the contract between the successful bidder and the government agency.

According to the plaintiffs, the Kiewit defendants developed and used a conduit scheme to avoid complying with the set-aside regulations that, nevertheless, caused it

to appear they were in compliance. Plaintiffs alleged that the Kiewit defendants regularly employed Global Consultants/Construction ("Global") and Seaway Construction, Inc. ("Seaway"), both of which were certified as minority business enterprises ("MBEs") and woman business enterprises ("WBEs"), to act as "conduits," "fronts," or "pass-throughs." As alleged in the amended complaint, a "conduit" is an MWBE that agrees to be named as a subcontractor but does not perform the subcontract in a commercially meaningful manner. The work actually is performed by the prime contractor. A "front" is a company that purports to be an MWBE, but is not. A front appears to be an MWBE through trust agreements or similar arrangements. A "pass-through" is an MWBE subcontractor that buys goods to be counted toward fulfillment of MWBE goals. Often, conduits, fronts, and pass-throughs (collectively "conduits") do not earn a legitimate profit. Rather, the fees paid through these arrangements are much smaller than the profits that legitimate MWBEs could earn on the projects.

In their original complaint, the plaintiffs sought damages under RICO on behalf of themselves and the broad class of all MWBEs (except those acting in concert with the Kiewit defendants) certified in the construction trades at any time after January 1, 1982. The district court dismissed the complaint because plaintiffs lacked statutory standing, as alleged in the complaint, to bring the case as a RICO action. The complaint was dismissed without prejudice and with leave to refile with alternative claims. Plaintiffs, however, filed a motion to alter the judgment to permit them to file amended RICO claims, which the district court granted.

In the amended complaint, plaintiffs alleged that the set-aside regulations require projects to be awarded only to prime contractors who complied with the regulations;

and that each named plaintiff was an MWBE subcontractor for the lowest complying contractor on at least one project improperly awarded to Kiewit. The amended complaint was limited to the class of MWBEs that were identified as subcontractors by the lowest bidding prime contractors not listing Global Consultants/ Construction or 3A Industries as an MWBE subcontractor or joint venture partner on certain identified projects.

According to the amended complaint, Imagineering, Inc., a WBE engaged in the business of structural metal fabrication, was designated as a WBE on the West Seattle Low Bridge project by Guy F. Atkinson Construction Company, which was the lowest complying prime contractor on that project. Nevertheless, the project was awarded to Kiewit-Global, a joint venture that purported to satisfy the set-aside regulations by including a front as a joint venture partner. Similarly, the complaint alleged that Knighten Brothers, a MBE certified to perform excavation, concrete and pipeline work, was designated as an MBE on the Cedar Falls Dam project by prime contractor Morrison-Knudsen. Apparently, Morrison-Knudsen finished second in the final bidding to Kiewit. Imagineering and Knighten Brothers made an offer of proof that they had submitted bids to the lowest complying contractors on these projects.

Because they allegedly lost the profits that they would have earned on these projects due to Kiewit's unlawful use of the conduit scheme, Imagineering and Knighten Brothers filed this action seeking relief under RICO, the Civil Rights Act and Washington state law. The plaintiff MWBEs charged that Kiewit implemented, perpetrated, and concealed the scheme through a pattern of racketeering activity. Each of the contracts on which the conduit scheme was used was obtained through acts of mail fraud; namely, Kiewit submitted its bid knowing that,

if it was the successful bidder, it would be mailed a "Condition of Award" letter which made use of the designated MWBE subcontractors a condition of the contract. Further, Kiewit perpetuated and concealed its scheme by mailing false compliance reports, and obtained final payments by mailing false certifications of compliance.

Plaintiffs assert that Kiewit, through its misconduct, was able to divert to itself profits that should have been earned by legitimate MWBEs; that the conduit scheme gave Kiewit an extra profit margin that it could sacrifice in part in order to underbid competition; and that the scheme was used to discriminate against minorities and women by excluding them from job sites.

The district court dismissed the amended complaint for lack of RICO standing. Because the MWBEs could not set forth a reasonable business expectancy in particular subcontracts, they could not establish that they were injured by reason of Kiewit's purported RICO violation. The district court dismissed plaintiffs' civil rights and pendent state law claim on similar grounds. The plaintiff MWBEs filed a timely appeal from that dismissal.

STANDARD OF REVIEW

Dismissal of a complaint under Fed. R.Civ. P. 12(b)(6) is reviewed de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990). In reviewing a 12(b)(6) dismissal, all allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). The decision of the district court may be affirmed on any grounds finding support in the

record. Myers v. United States Parole Comm'n, 813 F.2d 957, 959 (9th Cir. 1987).

DISCUSSION

1. Jurisdiction for RICO claims seeking equitable relief.

Initially, Kiewit contends that the district court lacked jurisdiction over the RICO claims for equitable relief. According to Kiewit, the amended complaint asserts that under RICO, 18 U.S.C. § 1964(c), the plaintiffs are entitled to "disgorgement of the profits earned by defendants that should have been earned by plaintiffs." Relying on Religious Technology Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987), Kiewit argues that disgorgement of profits is an equitable remedy; the district court lacks jurisdiction to award equitable injunctive relief to private RICO plaintiffs under section 1964(c); thus, the district court lacked jurisdiction here.

In Wollersheim, our circuit held that injunctive relief was not available to a private plaintiff in a civil suit under RICO. Id. at 1077-89. Based upon a thorough review of the language and legislative history of the RICO Act, the court concluded that "Congress did not intend to give private RICO plaintiffs any right to injunctive relief." Id. at 1088. The court reasoned that: For civil RICO, there are strong indicia of congressional intent against any implied injunctive relief remedy. Similarly, there is no indication in the language of section 1964 that civil RICO was not intended, as its plain wording states, to limit private plaintiffs only to damages, costs, and fees. Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO. Id.

Significant here, however, is the fact that in Wollersheim, the court noted that the complaint also included a claim for money damages under RICO. On that basis, the court allowed that the plaintiffs "apparently satisfie[d] the federal jurisdictional requirements for a civil RICO damages action."[1] Similarly, in the amended complaint here, the MWBE plaintiffs also requested "damages according to proof, trebled" under RICO. Thus, without deciding whether the holding in Wollersheim would extend to bar the district court from granting the MWBEs' request for disgorgement, the district court had federal question jurisdiction over the RICO claims.[2]

2. Jurisdiction for civil rights claims seeking injunctive relief.

Kiewit contends the district court lacked jurisdiction over the MWBE plaintiffs' Title 42 claims for injunctive relief. Kiewit argues that to assert a claim for injunctive relief under sections 1981, 1982, and 1985, the plaintiffs must have "remedial standing." Specifically, Kiewit asserts that MWBEs must "adduce a credible threat of recurring injury." According to Kiewit, the burden of establishing this likelihood of future harm rests with the plaintiffs, and is a threshold jurisdictional issue. Kiewit charges that the amended complaint failed to meet this jurisdictional test.

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[1] Maintaining such an action is of course dependent upon establishing RICO standing, i.e., injury and proximate cause. See, e.g., Religious Technology Ctr. v. Wollersheim, 796 F.2d 1076, 1080 n.6 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987).

[2] Because of our resolution of the other issues raised in this appeal, we need not decide the significance of Wollersheim to the plaintiffs' request for disgorgement.

Although Kiewit limited its jurisdictional challenge to the MWBE plaintiffs' claim for injunctive relief under sections 1981, 1982, and 1985, it has broader jurisdictional application. Article III of the United States Constitution requires that a plaintiff make out a "case or controversy" between itself and a defendant if the action is to be heard in federal court. Warth v. Seldin, 422 U.S. 490, 498 (1975). By this requirement, federal jurisdiction is limited to those cases in which an adversarial setting is guaranteed by the parties' "personal stake" in the outcome of the litigation. Id.

Recently, the Court summarized the basic principles of Article III standing as follows: To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an injury in fact. That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Further, the litigant must satisfy the causation and redressability prongs of the Art. III minima by showing that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision. The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing. Whitmore v. Arkansas, 495 U.S. 149, 155-56 (1990) (citations and quotations omitted).

In this case, the MWBEs sought damages and injunctive relief. The amended complaint pleaded that the bidding process required successful prime contractors to use its designated MWBEs. Imagineering alleged that it

is certified as a WBE to perform fabricated structural metal manufacturing and miscellaneous structural metal work, and that, but for Kiewit's illegal conduct, it would have received a subcontract on the West Seattle Low Bridge project. Similarly, Knighten Brothers alleged that is an MBE certified to perform excavation work, concrete work and water and sewer pipeline work, and that, but for Kiewit's illegal conduct, it would have received a subcontract on the Cedar Falls Dam project. Also, the amended complaint claimed that the plaintiffs suffered direct injury as a result of the conduit scheme because they were deprived of profits they would have earned on those subcontracts. We conclude that the complaint alleged sufficient facts to confer Article III standing for the MWBE plaintiffs' claims for damages.

In addition to the core constitutional standing test are judicially created prudential limitations, including the "requirement that a plaintiff's complaint fall within the zone of interests protected" by the pertinent law. Allen v. Wright, 468 U.S. 737, 751 (1984). When injunctive relief is sought, the plaintiff must show "a very significant possibility of future harm in order to have standing to bring suit." Coral Constr. Co. v. King County, 491 F.2d 910, 929 (9th Cir. 1991) (quotation omitted), cert. denied, 112 S. Ct. 875 (1992). See also Kolender v. Lawson, 461 U.S. 352, 355 n. 3 (1983) (At least when injunctive relief is sought, litigants must offer proof of a "credible threat" of recurrent injury.).

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the plaintiff brought suit under 42 U.S.C. § 1983 for damages and declaratory and injunctive relief against the City of Los Angeles and four of its police officers. In the course of a routine traffic stop, a police officer allegedly put the plaintiff in a "chokehold" without provocation or justification. The Supreme Court reversed our circuit's

affirmance of a preliminary injunction and held, inter alia, that the plaintiff lacked standing under the case or controversy clause of Article III to seek injunctive relief and consequently the lower courts lacked jurisdiction over the claim for injunctive relief. Id. at 105-07. The Court stated that: Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. Id. at 101-02 (citations and quotations omitted).

We conclude that the amended complaint failed to allege sufficient facts to confer standing for purposes of injunctive relief. The complaint did not allege that the named plaintiffs would suffer the same purported injury in the future: loss of subcontracts due to the awarding of bids to Kiewit.

3. Jurisdiction for the Washington state law claim seeking the imposition of a constructive trust.

Kiewit contends the district curt lacked jurisdiction over the plaintiffs' state law claim for imposition of a constructive trust. Kiewit asserts that because there was no independent basis for federal jurisdiction over the state law claim, the district court should have dismissed it for lack of jurisdiction following the dismissal of the federal claims.

Section 1367(c)(3) provides that "[t]he district courts may decide to exercise supplemental jurisdiction over a

claim . . . if the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367. The exercise of pendent jurisdiction to hear state claims is within the discretion of the federal district court. United Mine Workers of America v. Gibbs, 338 U.S. 715, 726 (1966). Nevertheless, in dictum the Court in Gibbs stated that "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." Id.

This instruction, however, is not mandatory and inflexibly applied in all cases. Rather, "[t]he statement simply recognizes that in the usual case in which federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). These factors include economy, convenience, fairness, and comity in deciding whether to retain jurisdiction over pendent state claims. Id. at 353. Because the weighing of these factors by the district court is discretionary, Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205-06 (9th Cir. 1991), we review only to determine whether the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. United States v. City of Twin Falls, Idaho, 806 F.2d 862, 868 (9th Cir. 1986), cert. denied, 482 U.S. 914 (1987).

Our circuit frequently has upheld decisions to retain pendent claims on the basis that returning them to state court would be a waste of judicial resources. See, e.g., Schneider v. TRW, Inc., 938 F.2d 986, 994 (8th Cir. 1991) (cases cited therein). In this case, the district court had the power to decide the pendent claims, and exercised its discretion to do so. This case has been in federal court for some time now. The district court dismissed the

original complaint and granted the plaintiffs leave to file an amended complaint.

While the amended complaint included the state law claim for constructive trust, the federal claims were substantial. Under the circumstances, the district court did not abuse its discretion by declining to send this case to state court for a determination of that case law claim.

4. Dismissal of the RICO claims for failure to state a claim.

(a) RICO standing

The MWBE plaintiffs contend that the district court erred in dismissing their RICO claims. The plaintiffs argue that the amended complaint pleaded injury to their businesses, which is an injury to a business interest. Thus, according to plaintiffs, the court erred when it dismissed the complaint for lack of standing because it failed to establish a property right in the subcontracts plaintiffs allegedly would have received.

Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." 18 U.S.C. § 1964(c). The Supreme Court has stated clearly that "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) (predicate acts alleged were mail and wire fraud). In order to state a claim under section 1962(c), a plaintiff must allege the following: 1) conduct; 2) of an enterprise; 3) through a pattern and 4) of racketeering activity. Id. at 496

(footnote omitted). "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation" Id.

Although RICO is to be "literally construed," id. at 497-98, not all injuries are compensable under this section. Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) (en banc), petition for cert. filed, 61 U.S.L.W 3171 (U.S. Sept. 1, 1992) (No. 92-385). Case law in our circuit limits injuries compensable under RICO. See id. A showing of "injury" requires proof of concrete financial loss. Id. (citing with approval Fleischhauer v. Feltner, 879 F.2d 1290, 1299-31 (6th Cir. 1989) (plaintiffs under section 1964(c) entitled to recover only for money they paid out as a result of racketeering activity), cert. denied, 493 U.S. 1074 and 494 U.S. 1027 (1990)). See also Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (Actual injury, that is financial loss or injury, is required to recover under RICO.).

As discussed above, the MWBE plaintiffs contend that their injury was not receiving the subcontracts to which they were entitled. At paragraph 32 in the amended complaint, plaintiff Imagineering states that it was deprived of a subcontract on the West Seattle Low Bridge project because the general contract was awarded to Kiewit-Global. According to Imagineering, the lowest bidder not using a front or conduit was Guy F. Atkinson Construction Company, which had designated them as the WBE on the project. Thus, Imagineering claims that the prime contract should have been awarded to Atkinson, and that it would have received the subcontract.

Paragraph 33 makes a similar claim involving plaintiff Knighten Brothers. On a rebid of the Cedar Falls Dam project, the lowest bidder was Kiewit, which received the

contract. Plaintiffs allege that because Kiewit designated a front as the MBE subcontractor, its bid did not meet the set-aside requirements, and it should not have received the prime contract. The second lowest bidder was Morrison-Knudsen, which had designated plaintiff Knighten Brothers as MBE subcontractor. Plaintiffs assert that Morrison-Knudsen should have received the prime contract, and in that event, Knighten Brothers would have had a subcontract.

Although plaintiffs characterize their injury as one compensable under RICO, that characterization must be challenged on several bases. First, the facts alleged do not establish "proof of concrete financial loss," let alone show that money was paid out as a result of Kiewit's alleged racketeering activity. Next, even if the type of injury alleged by the MWBEs could be compensable, it is not at all clear that these MWBEs suffered such an injury. Although plaintiffs assert that if specified contracts had not gone to Kiewit those contracts would have been awarded to the plaintiffs' prime contractors, that cannot be established. Indeed, although plaintiffs challenge the district court's reasoning that the next lowest bidder has no claim to the prime contract as Washington law permits the awarding agency to reject all bids and readvertise,[3] see Wash. Rev. Code §§ 47.28.090 and 39.19.070,

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[3] In their brief, plaintiffs rely on Seattle Ordinance § 20.46.090 B.1, which provides in part that "bids or proposals not including both minority business enterprise and women's business enterprise participation in an amount which equals or exceeds that required by the bid conditions or request for proposal shall be declared nonresponsive." This section merely sets forth some of the utilization requirements for public works contracts. It does not outline the procedure to be followed when selecting another contractor in the event that the prime contractor selected is unable to comply.

paragraph 33 of their complaint states that: The City of Seattle first awarded the Cedar Falls Dam Contract in April 1986 to Morrison-Knudsen, which had designated plaintiff Knighten Brothers as an MBE subcontractor. Kiewit and Global successfully protested this award, and the contract was rebid. On the bid, Kiewit submitted the low bid, designating Global as an MBE subcontractor.

Even if we assume that the MWBE plaintiffs' prime contractors would have received the contracts and they were obligated to award Imagineering and Knighten Brothers the subcontracting work merely on the basis of "designating" them in the bids, there is no guarantee that the WBE or MBE subcontractor chosen would not be substituted during the pendency of the contract. See Wash. Admin. Code § 326-30-080.

Finally, the complaint does not allege specific bids submitted by the MWBE plaintiffs that were accepted by the prime contractors. It is impossible to determine from the amended complaint whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits. Considered as a whole, the amended complaint alleges only a speculative injury, which is not compensable under RICO. Thus, plaintiffs have failed to establish RICO standing; namely that they were injured in their businesses "by reason of" Kiewit's conduct.

(b) RICO Proximate Causation

The MWBE plaintiffs contend that the district court erred in holding that they could not demonstrate proximate cause. Relying on this circuit's decision in Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990), rev'd sub nom, Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992) and the Supreme Court's decision in Sedima, 473 U.S. 479, they

argue that the "by reason of" language of the statute allows RICO claims by plaintiffs who, although maybe not intended victims, were foreseeable victims who were proximately injured by the pattern of racketeering activity.

In Holmes, the Supreme Court incorporated the proximate causation element of the Clayton Act into section 1964(c) to hold that a RICO plaintiff must show that his injury was proximately caused by the defendant's wrong. 112 S. Ct. at 1316-18. The Court reasoned that when Congress enacted RICO it was aware of the interpretation federal courts had given the words of the statute earlier Congresses had used first in section 7 of the Sherman Act, and later in section 4 of the Clayton Act; therefore, Congress must have intended them to have the same meaning courts had already given to them. Id. at 1317-18.

In order to maintain a cause of action under RICO then, the plaintiff must show not only that the defendant's violation was a "but for" cause of his injury, but that it was the proximate cause as well. Id. at 1317. This requires that there must be a direct relationship between the injury asserted and the injurious conduct alleged. Id. at 1318. "[A] plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." Id. One principle underlying this requirement is that the less direct an injury is, the more difficult is becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Id.

Plaintiffs urge this court to interpret the proximate causation requirement liberally. Their argument is as follows: As a result of its pattern of mail fraud, bribery and extortion, Kiewit has unlawfully obtained prime

contracts. Because Kiewit obtained those contracts through fraud, the contracts should have been awarded to the lowest-complying prime contractors, which had committed to employ plaintiffs as subcontractors. As in Vigman . . ., plaintiffs were not the direct victims of defendants unlawful activities, but their injuries were proximately caused by those activities.

Apparently, plaintiffs also contend a direct relationship existed because the set-aside programs provide MWBEs with a portion of the contract and the attendant profits and Kiewit's conduct allowed it to obtain not only the profits that should have been earned by the lowest-complying prime contractor, but also the separate profits that should have been earned by the designated MWBE plaintiffs.

In reversing this court's decision in Vigman, the Supreme Court agreed that our circuit properly interpreted section 1964(c) to require proximate causation. 112 S. Ct. at 1317 n.11. It did not agree, however, that the link between the defendant's conduct and the plaintiff's loss could satisfy the direct injury requirement.

The plaintiff in Vigman was the Securities Investor Protection Corporation ("SIPC"). It alleged that the defendant conspired in a stock manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's statutory duty to advance funds to reimburse the customers. Assuming, arguendo, that the SIPC would be entitled to recover because it subrogated to the rights of customers of the disabled broker-dealers who did not purchase manipulated securities, the Court nevertheless found the link between the stock manipulation alleged and the customer's harm too remote because it was purely contingent on the harm suffered by the broker-dealers. 112 S. Ct. at 1319.

According to the Court, the harm caused by the defendant's act was insolvency for the broker-dealers, leaving them unable to pay the customer's claims; and the cause of the customer's injuries was the insolvency. It was only the intervening insolvency that connected the defendant's acts to the losses suffered by the customer. Id. Consequently, while it appears that but for causation was present, and perhaps it was foreseeable that the customers would be injured, the direct relationship between the injury and the conduct was missing.

The Court's analysis in Holmes dictates a similar result in this case. Assuming the bad conduct by Kiewit deprived the named prime contractors of specified projects, and that in turn foreseeably deprived the MWBE plaintiffs of the subcontracts, "but for" causation appears present. It is much more difficult, however, to take the next step and determine that there exists a direct relationship between Kiewit's conduit scheme and the plaintiffs' failure to earn certain profits on the subcontracts. The direct harm in this case runs to the prime contractors. It was the intervening inability of the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries. Under Holmes, the MWBE plaintiffs are missing the direct relationship needed to show Kiewit proximately caused their injuries.

Additionally, the policy concerns underlying the direct relationship requirement are present here. Because of the indirect nature of the injury it is difficult for the court to ascertain what amount of damage suffered by the plaintiffs is attributable to just Kiewit's conduct, apart from other factors. Also, it may be difficult for the court to apportion damages among the subcontractors and prime contractors without permitting multiple recoveries. Essentially, the rule has more to do with problems of proof than with foreseeability.

Because the MWBE plaintiffs did not adequately allege RICO standing or RICO proximate causation, the district court's Rule 12(b)(6) dismissal of the RICO claims must be affirmed. Plaintiffs' RICO claims were properly dismissed on either ground.

5. Dismissal of the civil rights claims for failure to state a claim.

On appeal the MWBE plaintiffs challenge only the district court's dismissal of their 42 U.S.C. § 1981[4] claim, and only as it relates to the MBE plaintiffs. They argue that the amended complaint adequately pleaded Kiewit's intentional, class based discrimination prohibited under the Civil Rights Act. Plaintiffs argue that they alleged that defendants had two reasons for their actions-one based on race and one based on profit-and the existence of an economic motivation could not cure the purported racial discrimination.

Section 1981 provides in relevant part that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. The relevant provision in section 1981

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[4] Plaintiffs do not challenge the dismissal of their section 1982 claim in the opening brief. Nor do they rebut Kiewit's contention that this argument has been waived. See Collins v. City of San Diego, 841 F.2d 337, 339 (9th Cir. 1988) (Claims not argued in appellant's brief are deemed abandoned.). Further, although plaintiffs do not argue their claim under 42 U.S.C. § 1985 in either brief, they apparently wish to revive the claim in the event this court reverses the district court's dismissal of the section 1981 claim. As we affirm the court's dismissal of the plaintiffs' section 1981 claim, we need not discuss the section 1985 claim.

extends to private conduct and protects two rights: "the same right . . . to make and enforce contracts." Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989). Proof of intent to discriminate is necessary to establish a violation of section 1981. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390-91 (1982). Thus, while the federal rules require only that plaintiffs aver intent generally, Fed. R. Civ P. 9(b), under section 1981 they must at least allege facts that would support an inference that defendants intentionally and purposefully discriminated against them. See Patterson, 491 U.S. at 186-87; London v. Coopers & Lybrand, 644 F.2d 811, 818 (9th Cir. 1981).

An important purpose of section 1981 is to eliminate race based interference with the right of each citizen to contract. In accordance with this principle, courts have not imposed a privity of contract type requirement that would otherwise protect third parties from section 1981 liability. See, e.g., London, 644 F.2d at 817-18; Woods v. Graphic Communications, 925 F.2d 1195, 1202-03 (9th Cir. 1991); Daniels v. Pipefitters' Ass'n Local Union No. 597, 945 F.2d 906, 913-916 (7th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992).

Here, the MWBE plaintiffs did not allege that Kiewit refused to enter into a contract with them on the basis of race, or offered to make a contract only on racially discriminatory terms. Rather, the plaintiffs alleged that Kiewit's acts were committed in order to intentionally deprive them of an opportunity to enter into the subcontracts with the named innocent prime contractors on the basis of race. While these allegations normally may be adequate to state a claim under section 1981, see London, 644 F.2d at 818, the claim in this case must fail for other reasons.

We simply cannot know what contract Kiewit prevented the MBE plaintiffs from entering into. Assuming that Kiewit engaged in the conduit scheme, it was done in an attempt to secure the government contracts and the attendant profits for themselves. In each instance there was only one prime contract to be awarded. Obtaining the bid over its competitors necessarily had the effect of preventing other prime contractors from subcontracting the work to its MBEs because there was no contract available. The fact that Kiewit may have acted wrongfully in order to gain that contract, even if it was racially motivated, does not provide a basis for section 1981 liability. Consequently, we must affirm the district court's dismissal of this claim.

6. Dismissal of the claim for a constructive trust.

Plaintiffs contend that the district court erred when it dismissed their claim from a constructive trust on the profits that Kiewit earned on the wrongfully obtained contracts. The MWBEs argue that they pleaded a claim for constructive trust by alleging that Imagineering would have received a subcontract on the West Seattle Low Bridge project, and Knighten Brothers would have received a subcontract on the Cedar Falls Dam project. According to plaintiffs, a constructive trust is appropriate in this circumstance because Kiewit obtained the profits by virtue of committing a fraud upon the MWBEs.

In Washington, "[a] constructive trust will be found when property is acquired under circumstances such that the holder of legal title would be unjustly enriched at the expense of another interested party." Huber v. Coast Inv. Co., 638 P.2d 609, 612 (Wash. Ct. App. 1981). See also Scymanski v. Dufault, 491 P.2d 1050 (Wash. 1971) (A constructive trust was imposed where defendant intentionally interfered with plaintiff's business

relationship and thereby acquired property that was the subject of that relationship.); Viewcrest Cooperative Assn' v. Deer, 422 P.2d 832 (Wash. 1967) (Constructive trust is a proper remedy upon factual situations which constitute something less than actionable fraud).

While equity compels the imposition of a constructive trust under a variety of circumstances, i.e., fraud, breach of a fiduciary duty, other wrongful acquisition of property, one precondition is present in each factual situation; namely, that the plaintiff establishes he is entitled to the property. See, e.g., id. As the foregoing discussion indicates, the MWBE plaintiffs have failed to establish that they were entitled to the profits held by Kiewit. Consequently, we conclude there was no basis for granting such a constructive trust and the district court's dismissal must be affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35970

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,

Plaintiffs-Appellants,

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.,

Defendants-Appellees.

DECIDED: October 7, 1992

BEFORE: EUGENE A. WRIGHT, ROBERT R. BEEZER, and EDWARD LEAVY, Circuit Judges.

LEAVY, Circuit Judge:

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for

the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered October 7, 1992

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IMAGINEERING, INC., et al., Plaintiffs,	No. C90-1375R
v.	ORDER OF DISMISSAL
KIEWIT PACIFIC COMPANY, et al., Defendants.	

THIS MATTER comes before the court on defendants' motion to dismiss plaintiffs' amended complaint. Having reviewed the motion, together with all documents in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs brought this class action against Kiewit Pacific Co., Kiewit Construction Co., Peter Kiewit Sons;, Inc., and Paschen Contractors, Inc., alleging injury by reason of defendants' violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. Plaintiffs originally were Daley's Dump

Truck Service, Imagineering, Inc., Knighten Bros. Construction and the class of approximately 700 other minority and woman-owned business enterprises they sought to represent. On January 28, 1991, this court granted defendants' motions to dismiss. On March 12, 1991, the court granted plaintiffs' motion to permit amendment of the complaint.

Plaintiffs filed an amended complaint on March 22, 1991, which incorporates the following changes: (1) Paschen is no longer a defendant; (2) Plaintiffs now seek to represent approximately 50-75 minority and woman-owned business enterprises that were identified on construction project bids by the lowest-bidding prime contractor that complied with minority set aside requirements; (3) Plaintiffs allege that they would have received subcontractors if the prime contracts had been awarded to the lowest-bidding prime contractor that complied with set aside requirements; (4) Plaintiffs claim that since defendants did not comply with the set aside requirements, the prime contracts should have been awarded to the lowest bidding contractor that did comply; (5) Plaintiffs claim defendants intentionally and purposefully deprived them of rights based on their race, and demand relief under Title 42 U.S.C. §§ 1981, 1982 and 1985(3); (6) Plaintiffs demand relief under the theory of constructive trust.

Defendants now move for dismissal of the amended complaint for failure to state a claim. They argue that plaintiffs lack standing under RICO; fail to allege a RICO violation and predicate acts; fail to allege a contract or property right that is protected under Title 42; fail to allege facts that would support a finding of intentional discrimination; and fail to allege grounds for imposing a constructive trust. Defendants argue that plaintiffs' claims are barred by the statute of limitations.

II. DISCUSSION

A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); King v. California, 784 F.2d 910, 912 (9th Cir. 1986), cert. denied, 484 U.S. 802 (1987).

A. RICO Claims

To have standing under RICO, plaintiff must allege injury "in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). The "by reason of" language requires a showing of proximate cause and injury. See, O'Malley v O'Neill, 887 F.2d 1557, 1561 (11th Cir. 1989), cert. denied, 110 S. Ct. 2620 (1990); Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987) (compensable injury is harm caused by predicate act relied upon).

Plaintiffs contend that their injury consists of failing to receive subcontracts to which they were entitled. The amended complaint alleges at paragraph 32 that plaintiff Imagineering, Inc., was deprived of a subcontract on the West Seattle Low Bridge project because the general contract was awarded to Kiewit-Global. According to paragraph 32, the lowest bidder not using a front or conduit was Atkinson Construction Company, which had designated Imagineering as woman's business enterprise on the project. Plaintiffs claim that the prime contract should have been awarded to Atkinson, and that Imagineering under the circumstances would have received a subcontract.

Paragraph 33 makes a parallel claim involving plaintiff Knighten Brothers. On a rebid of the Cedar Falls Dam

project, the lowest bidder was Kiewit, which received the contract. Plaintiffs allege that because Kiewit designated a front as minority business enterprise subcontractor, its bid did not meet the set-aide requirements, and it should not have received the prime contract. The second-lowest bidder was Morrison-Knudsen, which had designated plaintiff Knighten Brothers as minority business enterprise subcontractor. Plaintiffs claim that Morrison-Knudsen should have received the prime contract, and that in that case Knighten Brothers would have had a subcontract.

Plaintiffs fail to allege a compensable injury. Under Washington State law, if the lowest bidder fails to meet minority set aside requirements, the Department of Transportation may award the contract to the next lowest complying bidder, or may reject all bids and readvertise. Wash. Rev. Code. § 47.28.090 and § 39.19.070 (contracts shall be awarded to the next lowest bidder, or all bids may be rejected and new bids obtained). Since the awarding governmental body has discretion to reject all bids if the lowest bidder fails to meet set-aside requirements, the next lowest bidder has no claim to the prime contract, and minority businesses they designate as subcontractors have no claim to subcontracts.

Further, assuming arguendo that the next lowest bidding prime contractor had a claim to receive the prime contract, plaintiffs do not allege that their designation as minority or woman-owned subcontractors constituted a binding commitment by the prime contractor. Plaintiffs thus fail to assert a protectable interest in receiving subcontracts.

Plaintiffs argue that whether they would have received subcontracts but for defendants' conduit scheme is a question of fact for the jury. See Iconco v. Jensen Constr. Co., 622 F.2d 1291, 1300 (8th Cir. 1980) (second lowest

bidder allowed to prove that it would have received contract award absent successful bidder's wrongdoing). However, unlike plaintiff in Iconco, plaintiffs here do not identify specific subcontracts that they bid on, which should have been theirs Rather, they claim they were deprived of opportunities to obtain subcontracts. Under Washington law, such claim does not constitute a valid business expectancy. See Del Guzzi Construction v. Global Northwest, 105 Wash.2d 878, 719 P.2d 120, 126 (1986) (minority set-aside program did not create intention on part of County to benefit minority subcontractors directly); Broten v. May, 49 Wash. App. 564, 568-9, 744 P.2d 1085, 1088 (1988) (no reasonable expectancy where defendant withheld consent to enter commission agreement). Having failed to set forth a reasonable business expectancy in particular subcontracts, plaintiffs cannot establish that they were injured by reason of defendants' violation of RICO.

B. Title 42 Claims

1. Section 1981 claim

Section 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .

42 U.S.C. § 1981. Section 1981 provides a remedy when defendant intentionally and purposefully refuses to enter into a contract with plaintiff on the basis of plaintiff's race, or offers to make a contract only on racially discriminatory terms. Patterson v McClean Credit Union, 491 U.S. 164, 176-77 (1989). Since plaintiff Imagineering, Inc., alleges

discrimination based on sex rather than race, section 1981 provides no remedy for its claims.

The remaining plaintiffs claim that defendants' conduct in subverting the set-aside program interfered with their right to enter subcontracts with other contractors, and that racial discrimination was a substantial and motivating reason for defendants' activity.

The court finds that these allegations do not constitute a cognizable claim under section 1981. Plaintiffs do not assert that defendants refuse to enter contracts with them on the basis of race, or that they agreed to enter contracts only on a discriminatory basis. Plaintiffs' argument that defendants are liable under section 1981 because they caused third persons not to enter into contracts with them in unavailing. Cf. London v. Coopers & Lybrand, 644 F.2d 811, 818-19 (9th Cir. 1981). Plaintiff in London claimed that defendant provided adverse employment references with intent to preclude plaintiff from obtaining an employment contract. The allegation supported the inference that defendant committed intentional acts to prevent plaintiff from entering particular contracts. Here plaintiffs fail to identify specific contracts they sought, and intentional acts committed by defendants in order to deprive them of those contracts.

Further, although the court recognizes that under the liberal pleading requirements of Fed. R. Civ. P. 9(b), plaintiffs need only aver intent generally, under section 1981 they must allege facts that would support an inference that defendants intentionally and purposefully discriminated against them. See Patterson, 491 U.S. at 186-87; General Bld. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982); Woods v. Graphic Communications, 925 F.2d 1195, 1203 (9th Cir. 1991). The complaint does not support such as inference. It

appears from the facts alleged in the complaint that defendants' motivation for the fronting scheme was purely economic, not discriminatory. Plaintiffs' claim under section 1981 therefore must fail.

2. Section 1982 Claim

Section 1982 provides in pertinent part:

> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property.

Section 1982 affords a remedy when defendant intentionally and purposefully impairs plaintiff's right to acquire, hold, and convey property on the basis of plaintiff's race. City of Memphis v. Greene, 451 U.S. 100, 123-24 (1981). Since plaintiff Imagineering, Inc. alleges discrimination on the basis of sex, not race, it fails to state a claim under section 1982.

The remaining plaintiffs assert that defendants' fronting scheme was intentional and purposeful conduct that deprived them of property rights on the basis of their race. They claim defendants' conduct prevented them from receiving subcontracts under the minority set-aside program, which they otherwise would have been awarded.

However, plaintiffs have no property right in the subcontracts under the set-aside program. See Wash. Rev. Code § 47.28.090 and § 39.19.070 (Washington state law gives the awarding governmental body discretion to rebid the project if it discovers that the low bidder does not comply with the set-aside requirements). See also, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (expectation

of receiving a contract does not constitute a property right); Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980) (where state retained discretion to deny application for gaming license, applicant had no property right in expected receipt of license).

The court recognizes that under section 1982, plaintiffs need not allege that defendants' conduct was racially motivated. Phiffer v. Pround Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980). However, in order to succeed under the section, plaintiffs must prove a real or personal property right. Greene, 451 U.S. at 124. Absent a valid right to particular subcontracts, plaintiffs have failed to allege "any impairment to the kind of property interest that we have identified as being within the reach of § 1982." Id. The section 1982 claims therefore must fail.

3. Section 1985(3) claim

Section 1985(3) affords a cause of action where plaintiffs assert that defendants: (1) conspired (2) for the purpose of depriving civil rights, and (3) committed an act or acts in furtherance of the conspiracy, which (4a) injured plaintiff in his person or property, or (4b) deprived plaintiff "of having and exercising any right or privilege of

a citizen."[1] See Griffin v. Brechenridge, 403 U.S. 88, 102-03 (1971).

Plaintiffs assert that defendants conspired to deprive them of rights protected under the set-aside regulations and under 42 U.S.C. §§ 1981 and 1982. They contend that in furtherance of the conspiracy defendants entered contracts with conduit subcontractors, hired employees for the conduits for the purpose of appearing to comply with the set-aside regulations, and obtained and retained profits generated through use of the conduit scheme. Plaintiffs claim they have a right to participate in contracting to build government-funded public works projects, which was infringed upon by defendants' acts of conspiracy.

Plaintiffs' expectation of receiving subcontracts does not amount to a property right. Roth, 408 U.S. at 577. Further, the procedural guarantees of the set-aside program do not transform plaintiffs' expectation into a constitutionally protected "right or privilege." See Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980).

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[1] 42 U.S.C. § 1985(3) provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, an person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Since the awarding governmental body has discretion to rebid contracts if the lowest bidder does not comply with set-aside requirements, see Wash. Rev. Code. § 47.28.090 and § 39.19.070, plaintiffs have no constitutionally protected right to receive subcontracts on the disputed projects. See Jacobson, 627 F.2d at 180. Their claim under section 1985(3) therefore must fail.

C. Constructive Trust Claim

Plaintiffs assert the following claim that a constructive trust should be imposed under Washington state common law:

> As a proximate result of the misrepresentations contained in the bids, periodic reports, and certifications of compliance, and of the implementation of the conduit scheme, defendants wrongfully and illegally obtained and retained profits from the Projects. But for the conduit scheme and the concealment thereof, these profits should have been earned by plaintiffs and the members of the class. Defendants have been unlawfully enriched because they obtained and retained these profits thought the conduit scheme.

Under Washington law, "a constructive trust will be found when property is acquired under circumstances such that the holder of legal title would be unjustly enriched at the expense of another interested party." Huber v. Coast Investment Co., 30 Wash. App. 804, 810, 638 P.2d 609 (1981). See also, Scymanski v. Dufault, 80 Wash. 2d 77, 88-89, 491 P.2d 1050 (1971) (constructive trust impressed where defendant intentionally interfered with plaintiff's business relationship and thereby acquired property that was subject of that relationship).

To warrant imposition of a constructive trust, the court must find that plaintiff is entitled to property held by defendant. See Scymanski, 80 Wash. 2d at 88 (quoting Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank, 162 Wash. 437, 440, 299 P. 359 (1931)). Plaintiff is entitled to a contract wrongfully obtained by defendant if plaintiff proves an "existing business relationship between the parties, in which inhered a reasonable expectancy of fruition, except for [defendant's] interference, and damage resulting therefrom." Scymanski, 80 Wash. 2d at 84.

Plaintiffs here fail to assert a reasonable expectation of fruition of a contract. As set forth above, the prime contractors who designated plaintiffs as minority subcontractors had no legitimate expectation of receiving prime contracts. See, Wash. Rev. Code § 47.28.090 and § 39.19.070. Further, plaintiffs do not allege that their "designation" as minority subcontractors constituted binding commitments by the prime contractors to allow them to perform work. Absent a reasonable expectation of fruition of contracts, plaintiffs' claim for imposition of a constructive trust must fail.

Now therefore, defendants' motion to dismiss the amended complaint is GRANTED.

DATED at Seattle, Washington this 8th day of July, 1991.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DALEY'S DUMP TRUCK SERVICE, INC., a Washington corporation, et al., Plaintiffs, v. KIEWIT PACIFIC COMPANY, a Delaware corporation, et al., Defendants.	NO. C90-1375R ORDER GRANING DEFENDANTS' MOTION TO DISMISS COMPLAINT

THIS MATTER comes before the court on defendants' motions to dismiss. Having reviewed the motions, together with all documents filed in support and in opposition, having heard oral argument and being fully advised, the court finds and rules as follows:

I. BACKGROUND

This suit is a class action brought by plaintiffs Daley's Dump Truck Service, Imagineering Inc., Knighten Bros.

Construction and the class of approximately 700 other minority and woman-owned business enterprises ("MWBE's") that they seek to represent. Plaintiffs are certified by the state as MWBE's and are also certified by the federal government as disadvantaged business enterprises ("DBE's"). Plaintiffs have brought this suit against defendants Kiewit Pacific Co., Kiewit Construction Co. and Peter Kiewit Sons', Inc., ("Kiewit" or "the Kiewit defendants"), and Paschen Contractors, Inc. ("Paschen"), alleging RICO violations[1] stemming from defendants' alleged schemes to subvert the mandatory "set-aside" programs that require Kiewit to subcontract work to MWBE's.

Kiewit and other general contractors must comply with federal, state and local regulations that require specified levels of participation by MWBE's on public works projects. Plaintiffs allege that since the early 1980's, in direct violation of these set-aside programs, the Kiewit defendants schemed to circumvent these statutory requirements by regularly employing Global Consultants/Construction ("Global") and Seaway Construction, Inc., ("Seaway") to act as "conduits" or "fronts." Defendant Paschen is alleged to have arranged a conduit scheme with 3A Industries. This scheme purportedly allowed Kiewit and Paschen to appropriate for themselves the profit on subcontracts that defendants were legally required to award to legitimate MWBE's under the set-aside programs.

Specifically, plaintiffs describe the scheme as follows: The Kiewit defendants enlisted the participation of Global

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[1] Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961 et seq..

and Seaway, both of which are certified as MBE's and WBE's, and both of which agreed to act as conduits. Kiewit and the conduits agreed that Kiewit would name them as MWBE subcontractors on bids, even though the conduits would not prepare bids to obtain the subcontracts. If Kiewit was the successful bidder on a project, Kiewit advised the conduits of the nature of their subcontracts. In many instances, Global and Seaway were awarded subcontracts to perform kinds of work for which they were not certified. The conduits' role in performing the subcontracts was limited to requesting the necessary union workers pursuant to Kiewit's directions, and to supplying a minority employee to pose as the conduits' foreperson on the job site. The union crews were actually supervised by Kiewit personnel, and were paid by Kiewit through the conduits' bank accounts. The conduits neither performed the subcontracts nor earned a profit in the traditional sense of the word. Instead, Kiewit paid the conduits a fee for "fronting" on the projects. These fees are much smaller than the profits that would have been earned by legitimate MWBE's. This alleged scheme provided defendants with an additional profit margin that they could sacrifice to underbid the competition.

Plaintiffs allege that the scheme was implemented, perpetrated and concealed through a pattern of racketeering activity. Each of the contracts on which the conduit scheme was used was obtained through acts of mail fraud; Kiewit submitted its bid to the government knowing that, if it was the successful bidder, it would be mailed a "condition of award" letter which incorporated into the contract the identity of the MWBE subcontractors that Kiewit would use to satisfy the set-aside programs. Kiewit concealed the scheme by mailing false compliance reports to the government, and obtained final payments by

mailing false certifications of compliance. The fraudulent activity was directed at the governmental agencies that control public works contracting.

Kiewit allegedly concealed its schemes by bribing public officials, and by engaging in a pattern of extortion. The complaint specifically accuses certain officials within the Washington Office of Minority and Women's Business Enterprises and Seattle's Office of Human Rights of accepting bribes.

The complaint further alleges that the owner of plaintiff Knighten Brothers was threatened by managers of Global, Seaway and 3A Industries after he wrote a letter to the Seattle Office of Human Rights, complaining about the award of a contract to Kiewit and Global. The director of the Northwest Minority Contractors and Business Association, Charles Adams, was also allegedly threatened and intimidated.

The complaint sets forth a list of thirteen different contract jobs, including the West Seattle low bridge, various stages of the I-90 floating bridge, the 405 "S" Curves, and the Tacoma Wastewater Treatment Plant, where Kiewit used Global and Paschen used 3A Industries as the named MWBE's for the contracts. None of the plaintiffs have been awarded a significant subcontract from the Kiewit defendants or Paschen since at least 1982.

The class of plaintiffs represents all other legitimate MWBE's that potentially could be tapped for use in the projects on which Kiewit was awarded contracts. The complaint concludes that Kiewit and Paschen obtained profits through the alleged scheme that should have gone to the legitimate MWBE's. This caused injury to the

MWBE's businesses since it reduced the opportunity for plaintiffs to participate in public works contracts awarded to plaintiffs.

Plaintiffs seek relief in the form of treble damages of $5 million from the Kiewit defendants and $1.5 million from Paschen for lost profits and business opportunities from violation of RICO § 1962(c), injunctive relief prohibiting defendants from continuing with any conduit scheme, and attorneys' fees and costs.

The Kiewit defendants now bring a Rule 12(b)(6) motion to dismiss for failure to state a claim. Paschen has joined this motion and filed its own motion to dismiss for lack of subject matter jurisdiction as to the absence of a case or controversy. Defendants argue that plaintiffs lack standing to sue under RICO; plaintiffs fail to adequately allege a violation of § 1962(c); plaintiffs fail to properly allege predicate acts, especially fraud, because they show no injury, reliance, or causation even under mail fraud law; plaintiffs fail to plead the elements of a RICO conspiracy; and that the claims are limited by the statute of limitations.

The court requested oral argument, and directed that the arguments be focused on the question of plaintiffs' standing to bring this class action suit.

II. DISCUSSION

Defendants move for dismissal of plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.[2] A motion to dismiss tests the sufficiency of the allegations in the complaint. Rae v. Union Bank, 725 F.2d 478, 480-81 (9th Cir. 1984). The court will first address the arguments that plaintiffs lack standing to bring suit.

A. Constitutional Lack of Standing

Article III of the U.S. Constitution requires that a plaintiff make out a "case or controversy" between itself and a defendant if it is to be heard in federal court. Warth v. Seldin, 422 U.S. 490, 498 (1975).[3] Injury and causation are essential elements of any case or controversy:

> The constitutional limitations of article III contain three components: 1) a threatened or actual distinct and palpable injury to plaintiff; 2) a fairly traceable causal connection between the alleged

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[2] Since Paschen had already filed an Answer in this matter it technically cannot seek dismissal through Kiewit's 12(b)(6) motion. The court will treat the motion as through it was raised under Rule 12(c), which seeks judgment on the pleadings.

[3] This suit was brought to challenge the town of Penfield, NY and its Zoning, Planning and Town Boards, claiming that the town's zoning ordinance effectively excluded persons of low and moderate income from living in the town, in violation of the Civil Rights statutes. The Supreme Court upheld the District Court's decision to dismiss the complaint for lack of standing.

> injury and the defendants' challenged conduct; and 3) a substantial likelihood that the requested relief will redress or prevent the injury.

Hong Kong Supermarket v. Kizer, 830 F.2d 1078, 1081 (9th Cir. 1987). For a plaintiff to show injury and causation it must allege a personal stake in the outcome of the action:

> As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth, supra at 498-99 (emphasis in original).

The only plaintiffs whose claims may be considered in deciding whether plaintiffs have standing to bring this lawsuit are the named plaintiffs. "If the plaintiff has no standing individually, then no case or controversy arises, and the plaintiffs' claims are not typical of the claims of those who might otherwise litigate the action." 1 H. Newberg, Newberg on Class Actions, (2d ed. 1985) § 2.07 at 56. The Supreme Court also elaborates on this principle in Warth:

> Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents,

> "none may seek relief on behalf of himself or any other member of the class."

422 U.S. at 502, quoting in part O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (emphasis added). The Warth court held "that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." 422 U.S. at 499.

In order for the three named plaintiffs to "allege a personal stake" in this controversy, they must allege that they would have bid for and received some or all of the work given by defendants to the alleged fronts. At oral argument, plaintiffs conceded that the current named plaintiffs are unable to make an individualized argument for injury as to the enumerated projects in the complaint. However, they argue that the named plaintiffs and class members were injured through loss of business opportunities over the past eight years. Given the "hundreds" of projects on which defendants have been awarded contracts over the years, plaintiffs argue that the named class members statistically would have been awarded a subcontract at some point during this time period, absent the "conduit" scheme in place.

Following the analysis of Warth and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and viewing the complaint as it now stands, the court cannot find that the named plaintiffs have adequately established anything more than a "generalized grievance" about lack of potential business opportunities during past years. There are no allegations in the complaint that the named plaintiffs were qualified for, or bid on, any of the thirteen named projects at issue.

It is insufficient for purposes of threshold standing analysis to speculate that one of the named plaintiffs would have likely received at least one contract out of hundreds from defendants during the past decade, given the laws of probability.

Defendants conceded at oral argument that the constitutional standing problem could conceivably be overcome if additional specific facts were plead in the complaint. Given the court's ruling on other issues, it is not called upon to address that potential question.

B. Statutory Lack of Standing

18 U.S.C. § 1964(c) of RICO requires that plaintiff show injury "in his person or property by reason of" a RICO violation to prevail. The "by reason of" language creates standing and also requires that plaintiffs must show proximate cause and injury. O'Malley v. O'Neill, 887 F.2d 1557, 1561 (11th Cir. 1989), cert. denied, 110 S. Ct. 2620 (1990); Wilcox v. First Interstate Bank, 815 F.2d 522, (9th Cir. 1987).

As in the constitutional standing analysis described above, plaintiffs cannot achieve standing under RICO by simply describing a class whose other members may have standing. Allee v. Medrano, 416 U.S. 802, 828-9 (1974) ("It bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.") (Burger, C.J., in concurrence); Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3rd Cir. 1987) ("It is well settled that to be a class representative on a particular claim, the plaintiff must himself have a cause of action on that claim.")

Standing must be established before a court will look to Fed. R. Civ. P. 23 to evaluate the ability of named plaintiffs to represent the proposed class. Rule 23 cannot alter or abridge the limitations on cases, controversies, or statutory claims, that are mandated by the Constitution or by Congress.

> As a procedural rule, Rule 23 cannot be construed to extend or limit the jurisdiction and venue of federal courts or to abridge, modify or enlarge any substantive right. Thus, for example, a class action cannot confer standing to sue on a named plaintiff who seeks to represent a class . . . (A) class representative must have individual standing to raise the claims in controversy, and then that plaintiff can represent a class under procedural Rule 23.

1 H. Newberg, Newberg on Class Actions § 1.02 at 4-5.; § 2.08 at 61.[4]

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[4] This case is quite similar to that of Zimmerman, supra, where the representative plaintiffs sought to assert a RICO claim on behalf of a class that had allegedly lost money due to defendant's actions. The Third Circuit held:

> The plaintiff insisted at oral argument that, had the class been certified, class members who had paid money might have been located and persuaded to come forward as representatives. The plaintiff argues that the district court erred in dismissing the motion for certification as mooted by dismissal of the complaint instead of considering the merits of class certification . . . .

(continued...)

The RICO predicate acts that plaintiffs allege as causing injury are three types of mail fraud upon third parties, which in this case are the contracting governmental authorities. Each act of mail fraud that plaintiffs allege in their complaint concerns a mailing to or from the government.[5]

To adequately plead a mail fraud predicate act, plaintiff must allege harm to a property right, direct reliance upon a fraudulent misrepresentation by defendants, and causation. O'Malley v. O'Neill, supra. Defendants argue that since plaintiffs were only indirectly harmed by the alleged fraud against the governmental agencies, they have not suffered direct injury under RICO and therefore lack standing to sue. As described above, defendants point out that instead of direct harm, plaintiffs only allege that the scheme "reduced the opportunity for plaintiffs to participate in public works contracts awarded to defendants."

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[4](...continued)

> (W)e find no abuse of discretion in the district court's refusal to consider certification of a class before determining whether the named plaintiff, and a fortiori any putative class which the named plaintiff might properly seek to represent, had a federal cause of action.

834 F.2d at 1169-70.

[5] Plaintiffs also allege predicate acts of bribery and extortion. However, the court finds that named plaintiffs are unable to assert any standing based on injury for these acts since none of them were targets of the alleged bribes and extortion. The court will address itself only to standing related to the mail fraud allegations.

Washington law is clear that there is no property right in the mere desire to obtain business, without a valid contract or concrete expectation of gain. See Broten v. May, 49 Wn. App. 564, 568-9 (1988); Pleas v. Seattle, 112 Wn.2d 794, 800-2 (1989); Del Guzzi Construction v. Global Northwest, 105 Wn.2d 878 (1986) (no intention by government to directly benefit a minority business enterprise plaintiff through creation of minority participation program).

Plaintiffs are also unable to establish reliance and harm when the allegations involve fraud directed against the government.[6] In District Telecommunications Dev. Corp. v. District Cablevision, 638 F. Supp. 418 (D.D.C. 1985), the D.C. Circuit held that a private plaintiff lacked standing where the claims was for fraud upon the government. A cable television corporation sued its competitors under RICO alleging fraud in procuring the exclusive franchise to provide a cable television system to the District of Columbia. The court stated, "(p)laintiff is seeking compensation for a lost opportunity created by an alleged fraud perpetrated not on plaintiff but on the District of Columbia." Id. at 419. The court granted defendants' motion to dismiss and explained:

> Perhaps the most unusual aspect of this case is that plaintiff was not the prime target of any alleged fraud, but rather a third-party recipient of

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[6] See United States v. Lew, 875 F.2d 219, 221 (9th cir. 1989) ("While it is true that after McNally the elements of mail fraud remain unchanged except that the intent of the scheme must be to obtain money or property, the Court made it clear that the intent must be to obtain money or property from the one who is deceived . . .")

> its effects . . . Since there cannot be shown as a matter of law that but for defendants (sic) alleged fraud, plaintiff would have received a franchise . . . this court must dismiss plaintiff's claim as one which fails to state an injury cognizable under RICO.

Id. at 422. Plaintiffs argue that this case is distinguishable since the District of Columbia had discretion about allocating the contracts, while in this case there is no discretion. On the contrary, the court finds strong parallels to the case at bar since there was no guarantee that any particular plaintiff would be awarded a subcontract. The Kiewit defendants had full discretion over with whom it chose to subcontract. In fact, defendants were under no statutory obligation to award the subcontract to the lowest bidder.[7]

Although reliance is not an element of criminal mail fraud, when mail fraud is pled as a RICO predicate, reliance and causation are elements that must be pled.

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[7] Plaintiffs' citations to Iconco v. Jensen Construction Co., 622 F.2d 1291, 1300 (8th Cir. 1980) and Service Engineering v. Southwest Marine, Inc., 719 F. Supp. 1500 (N.D. Cal. 1989) are unsupportive of their position. In both cases the plaintiff was the second lowest bidder on a job that another business won under a small business set-aside, and the plaintiff claimed that the winner did not meet government requirements for a small business. In Iconco, the plaintiff not only proved that it was the second lowest bidder, but also that it alone would have received the contract because of its qualifications. In Service Engineering, plaintiff also proposed to meet this standard of proof. Neither case involved RICO claims or involved a potential class of members.

O'Malley v. O'Neill, 887 F.2d at 1563; Wilcox v. First Interstate Bank N.A., 815 F.2d 522, 532 (9th Cir. 1987).

In Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985), the court held that taxpayer/plaintiffs had no standing to bring RICO claims against private defendants who bribed county tax board members to obtain favorable tax assessments. The court held that the taxpayers were only indirectly injured by the consequent tax increases; the fraud was directed at the county. The county was the proper party with standing to bring the suit.[8]

Plaintiffs have conceded that in this alleged scheme, direct injury to named plaintiffs is difficult to establish with precision. Plaintiffs urge the court to look to antitrust law as a basis for characterizing the harm alleged here. Plaintiffs argue that their ability to allege "injury to business or property" need only be shown through proof that plaintiffs have taken "substantial steps" to enter the relevant market, and that those efforts "have been thwarted." See Central Telecommunications v. T.C.I. Cablevision, 800 F.2d 711, 729 (9th Cir. 1986).

In T.C.I. Cablevision, plaintiff was able to allege antitrust violations under § 4 of the Clayton Act by showing that it had made sufficient preparations to enter the cable television business, but was prevented from

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[8] The Carter court compared the plaintiffs' RICO argument to the "passing on" argument in antitrust law. This antitrust concept precludes indirectly injured customers from suing for recovery of overcharging. The indirect purchaser recovers nothing, even if it bore the whole overcharge and even if the direct purchaser did not sue. 777 F.2d at 1175; See also, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Kansas v. Utilicorp United, 110 S. Ct. 2807 (1990).

doing so through the alleged antitrust actions and tortious interference of defendant.

Plaintiffs argue that their "substantial steps" to enter the market consist of applying and qualifying for certification as MWBE's. Even if the court were to adopt the antitrust analogy for purposes of this standing argument, the court finds mere completion of the certification process to be insufficient for plaintiffs to meet the "substantial steps" threshold. Again, the deficiency turns on the named plaintiffs' inability to establish that they were appropriate businesses to bid on the projects at issue, or to establish they took steps to compete for selection as subcontractors on those jobs.

Conclusion

The court recognizes the dilemma faced by plaintiffs who feel that the alleged scheme has frustrated any ability to meaningfully participate in a State program specifically designed to aid the development of their businesses. If the allegations are true, this case may well represent what plaintiffs' counsel described at oral argument as "a wrong screaming for a remedy." Unfortunately, as the case is currently framed, the court finds that these plaintiffs lack statutory standing to bring this as a RICO action.[9]

Plaintiffs have asserted to the court that, should the court find a lack of RICO standing, they intend to amend their complaint to pursue alternative remedies.

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[9] Given the court's ruling on standing, it need not address the other grounds defendants set forth for dismissal of the complaint.

THEREFORE, the court GRANTS defendants' motions to dismiss the complaint, and dismisses the complaint without prejudice and with leave to refile with alternative claims. All other pending motions in this case are STRICKEN.

DATED at Seattle, Washington this 28th day of January, 1991.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

WASHINGTON ADMINISTRATIVE CODE 326

MINORITY AND WOMEN'S BUSINESS ENTERPRISE, OFFICE OF

WAC 326-02-010 Purpose. The purpose and intent of chapter 120, Laws of 1983, and of these rules is to provide the maximum practicable opportunity for increased participation by minority and women-owned business in participating in public works and the process by which goods and services are procured by state agencies and educational institutions from the private sector. This purpose will be accomplished by encouraging the full uses of existing minority and women-owned businesses and the entry of new and diversified minority and women-owned businesses into the marketplace. These rules shall be applied and interpreted to promote this purpose.

WAC 326-02-020 Applicability. This chapter applies to all applications for certification as a minority or women's business enterprise by the state of Washington and to all public works and procurement by state agencies and educational institutions: *Provided.* That this chapter does not apply where it is found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state. In such a case, the conflicting portions of this chapter are inoperative solely to the extent of the conflict and with respect to the agencies directly affected.

WAC 326-50-010 Participation programs, purpose and intent. It is policy of the state of Washington to provide

the maximum practicable opportunity for increased participation by minority and women-owned businesses in public works and the process by which goods and services are procured by state agencies and educational institutions from the private sector.

OMWBE is directed by RCW 39.19.030(1) to: "Develop, plan, and implement programs" to provide such opportunities for participation by qualified minority and women-owned businesses. OMWBE has found that there is a need to supplement the certification program in order to encourage MWBE participation in state contracts. Therefore, OMWBE will develop participation programs to advance the state of Washington's policy to mitigate the effects of societal discrimination, and to increase opportunities for minority and women-owned firms to do business with the state. The implementation of these programs will result in increased opportunities for MWBEs to develop and grow in the existing marketplace, and to assist them in establishing new business relationships with the state of Washington.

SEATTLE CITY ORDINANCES

WOMEN'S AND MINORITY BUSINESS UTILIZATION

20.46.090 Utilization requirements--Public works, consultant and other service contracts.

A. For all contracts for public works and contracts for consultant or other services, the estimated cost of which equals or exceeds Five Thousand Dollars ($5,000.00), the contract awarding authority shall furnish

the Director with an informational copy of all bid conditions and requests for proposals,if any, along with a statement identifying all funds provided by any other governmental agency which will be used in payment of the contract, prior to solicitation of bids or proposals, and the Director may make recommendations to the contract awarding authority with respect to provisions pertaining to women's business enterprise and minority business enterprise utilization.

B. Contracts for public works, the estimated cost of which equals or exceeds Ten Thousand Dollars ($10,000.00), and contracts for consultant or other services, the estimated cost of which equals or exceeds Fifteen Thousand Dollars ($15,000.00), shall be awarded and administered in accordance with the following standards and procedures:

1. In addition to the requirements set forth in subsection B of Section 20.46.080 and elsewhere, bid conditions and requests for proposals shall require bidders and proposers to include in their bid or proposal women's business enterprise participation in the contract in a percentage which equals or exceeds the awarding authority's annual goals and minority business enterprise participation in the contract in a percentage to be determined by the Director for the contract. The Director shall determine the minority business enterprise percentage for each contract based on the extent of subcontracting opportunities presented by the contract and the availability of minority business enterprises to perform such subcontracting work. Except as provided in subsection B2 of this section, bids or proposals not including both minority business enterprise and women's business enterprise participation in an amount which

equals or exceeds that required by the bid conditions or request for proposals shall be declared nonresponsive.

a. Bids and proposals shall identify the particular minority business enterprises and women's business enterprises to be utilized in performing the contract, specifying for each the dollar value of the participation, the type of work to be performed and such information as may reasonably be required to determine the responsiveness of the bid or proposal.

b. During the term of the contract any failure to comply with the levels of minority business enterprise or women's business enterprise participation identified in the bid or proposal shall be considered a material breach of contract.

2. A contract awarding authority or a department may request the Director to waive the set aside requirements of this subsection, or to reduce the amount of the set aside, for either or both minority business enterprises or women's business enterprises, by submitting the reasons therefor in writing to the Director prior to solicitation of bids or proposals or prior to the award of a contract supplement or amendment, or the issuance of a change order.

a. The Director may grant such a waiver or reduction upon determination that:

i. The reasonable and necessary requirements of the contract, contract supplement, amendment or change order render subcontracting or other participation of businesses other than the bidder, proposer or contractor infeasible; or

ii. Sufficient qualified minority and women's business enterprises capable of providing the goods or services required by the contract, are unavailable in the market area of the project, despite every feasible attempt to locate appropriate minority and women's business enterprises; or

iii. The contract, contract supplement, amendment or change order for which a waiver or reduction is sought is part of a planned series of related contracts, contract supplements, amendments or change orders which, when considered together, shall include women's and minority business utilization sufficient to meet the applicable utilization goals.

b. Only the requirements of subsection B1 of this section are waived by a waiver under this paragraph.

c. Any reductions in set aside amount granted by the Director shall specify the amount to which the set aside has been reduced.

d. Whenever the Director denies a request to waive or reduce a set aside, the contract awarding authority may appeal that denial to the Mayor, whose decision on the request shall be final.

C. All bid conditions and requests for proposals for consultant and other service contracts the value of which does not exceed Fifteen Thousand Dollars ($15,000.00), shall require bidders and proposers to make every effort to utilize women's business enterprises and minority business enterprises as subcontractors and suppliers. All bids and proposals shall identify projected women's

business enterprise and minority business enterprise participation, and the efforts made to utilize women's business enterprises and minority business enterprises.

D. For all consultant and other service contracts the value of which equals or exceeds One Thousand Dollars, ($1,000.00), the contract awarding authority shall solicit proposals from qualified minority and women's business enterprises. The contract awarding authority shall notify the Director prior to solicitation of bids or proposals whenever such qualified businesses cannot be identified, unless the Director has waived such notification requirement based on the known unavailability of such businesses. The Director shall attempt to identify such businesses, and if successful, shall notify the awarding authority, who shall provide such women's business enterprise or minority business enterprise every practical opportunity to submit bids or proposals.

E. All consultant selection panels and the Seattle Design Commission shall give appropriate consideration to the utilization goals of the contract awarding authority in evaluating, recommending and selecting contractors. The Director may assist such panels and the Design Commission in evaluating the impact of their recommendation or selection on achievement of the contract awarding authority's utilization goals.

(Ord. 114339 § 5, 1989; Ord. 114082 § 5, 1988; Ord. 109113 § 9, 1980.)

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-1144

In The

Supreme Court of the United States

October Term, 1992

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,

Petitioners,

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

IRWIN H. SCHWARTZ
(Counsel of Record)
710 Cherry Street
Seattle, WA 98104-1906
(206) 623-5084

SHERYL GORDON MCCLOUD
1111 Third Avenue, Suite 1060
Seattle, WA 98101
(206) 224-8777

Attorneys for Kiewit Pacific Company; Kiewit Construction Company; and Peter Kiewit Sons', Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Each petitioner is a disappointed potential subcontractor of a bidder that competed unsuccesfully for a prime contract. The court below ruled that petitioners cannot assert a RICO claim against the prime contractor to which the government let the job.

Is that decision consistent with this Court's decisions barring claims of "passed on" injury under the Clayton Act and RICO?

LIST OF PARTIES

Kiewit Construction Group, Inc. is the parent company that owns respondents Kiewit Pacific Co. and Kiewit Construction Company. Kiewit Construction Group, Inc. is entirely owned by Peter Kiewit Sons', Inc. Neither the subsidiaries nor the parent company has issued shares to the public.[1]

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[1] PKS Information Services, Inc. is a direct subsidiary of Peter Kiewit Sons', Inc. It is more than 90% owned by Peter Kiewit Sons', Inc. The remaining shares are owned by the employees. Kiewit Diversified, Inc. is a direct wholly owned subsidiary of Peter Kiewit Sons', Inc. The only indirect subsidiaries of Kiewit Diversified, Inc. whose shares are publicly traded are CCL Industries, Inc. and California Energy Company, Inc.

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STATEMENT OF THE CASE

1. Procedural history and summary of RICO claims

Three plaintiffs filed a RICO[2] claim against Peter Kiewit Sons', Inc., Kiewit Pacific Co., Kiewit Construction Co. (hereafter, collectively, "Kiewit"), and Paschen Contractors, Inc. The original complaint alleged that the plaintiffs were deprived of potential subcontracts for unspecified work on several public works projects. This "deprivation" allegedly occurred because various unnamed government agencies awarded prime contracts to Kiewit, rather than to other prime contract bidders that the plaintiffs preferred. As a result, the unsuccessful bidders for the prime contracts could not let subcontracts to petitioners or to any other company on those projects.

The district court dismissed the original complaint for lack of Article III and RICO standing. It ruled that plaintiffs alleged only a generalized grievance without specifying particular work of which they had been deprived and also failed to allege other elements of RICO. Order, pp. 6-9, CR:46,[3] 759 F. Supp. 1498 (W.D. Wash. 1991); A41-49.[4] The district court, however,

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[2] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

[3] We use "CR:xx" to designate the docket number in the Clerk's Record of the district court at which the cited document is located.

[4] We use "A___" to designate the page of the Appendix to the Petition to which we refer.

allowed plaintiffs to amend "to allege specific subcontracts that they would have received but for the 'conduit' scheme." Order, p. 2, CR:57.

Two plaintiffs amended their complaint, adding claims under 42 U.S.C. §§ 1981, 1982, 1985(3) and Washington law, but still failing to allege specific subcontracts that they would have received. CR:59 (amended complaint).[5] Each petitioner alleged that Kiewit bid for and received a public works construction contract that it did not deserve, and that a second place bidder (in petitioner Knighten Brothers' case)[6] or a third place bidder (in

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[5] As the Court of Appeals stated, "It is impossible to determine from the amended complaint whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits." Petition p. 8 (quoting A14). Petitioners err in asserting, without any citation to their complaint, "In fact, petitioners pleaded both, having been directed by the district court to allege specific contracts that petitioners lost as a result of Kiewit's unlawful scheme." Petition p. 8 n.3. The amended complaint still failed to identify specific subcontracts.

[6] Knighten Brothers' claim appears at ¶ 33, which provides in full:

> The City of Seattle first awarded the Cedar Falls Dam Contract in April 1986 to Morrison-Knudsen, which had designated plaintiff Knighten Brothers as an MBE subcontractor. Kiewit and Global successfully protested this award, and the contract was rebid. On the rebid, Kiewit submitted the low bid, designating Global as an MBE subcontractor. Because Global was a conduit as described above, Kiewit's bid did not meet the set-aside requirements and Kiewit should not have received the prime contract. The second low bidder on the rebid was Morrison-Knudsen, which again designated Knighten Brothers as an MBE subcontractor. Morrison-Knudsen's bid did not desig-

petitioner Imagineering's case) should have received that prime contract instead.[7] If the unsuccessful bidder had been awarded the contract, petitioners asserted, then they would have received some unspecified subcontract work.

The district court dismissed the amended complaint. Order, CR:88, A28. The Ninth Circuit affirmed. Applying *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___,

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nate any fronts as MWBE subcontractors. Morrison-Knudsen should have received the prime contract, and Knighten Brothers and other members of the class designated as MWBEs by Morrison-Knudsen would have received subcontracts.

[7] Imagineering's claim appears at amended complaint ¶ 32:

As a result of the conduit scheme, plaintiff Imagineering was deprived of a subcontract on the West Seattle Low Bridge project. The West Seattle Low Bridge was awarded by the City of Seattle in 1988 to Kiewit-Global, a joint venture. Because Global was a conduit as described above, Kiewit-Global should not have received the contract. The second low bidder was General Construction Co./3A Industries, a joint venture, which used 3A Industries (a conduit) to satisfy the set-aside requirements. The lowest bidder not using a front or conduit was the third lowest bidder, Guy F. Atkinson Const. Co. In its bid, Atkinson designated Imagineering as a WBE. Because the two lowest bidders intended to use conduits (and Kiewit has in fact used, and continues to use, Global as a conduit on the project) the set-aside requirements were not met by the two lowest bidders and the prime contract should have been awarded to Atkinson, and Imagineering and the other members of the class designated by Atkinson in its bid as MWBEs would have received subcontracts.

112 S.Ct. 1311 (1992), the Ninth Circuit ruled that petitioners, as possible subcontractors, could not assert a RICO claim of harm passed on by the awarding government agency to the unsuccessful prime contractors and by those unsuccessful prime contractors to them:

> The direct harm in this case runs to the prime contractors. It was the intervening inability of the prime contractors to secure contracts that was the direct cause of plaintiffs' injuries. Under *Holmes*, the MWBE plaintiffs are missing the direct relationship needed to show Kiewit proximately caused their injuries.

A18.

The Ninth Circuit also affirmed dismissal of the RICO claims on an alternative state law ground. It ruled that under Washington law, a second place bidder had no claim to the prime contract and petitioners had no guarantee of receiving or retaining any subcontracts. Hence, petitioners "failed to establish RICO standing." *See* A12-15.

2. The district court lacked jurisdiction

The district court lacked jurisdiction. Petitioners lacked RICO standing for the reasons discussed by the court below, A12-15. Standing is a threshold, jurisdictional, inquiry, *see, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 154-56 (1990); *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and the fact that petitioners lacked standing meant that the district court lacked jurisdiction. In addition, petitioners are barred from bringing suit by Article III and its related

prudential limitations[8] on standing. Article III requires that there be an actual "case or controversy."[9] Petitioners lacked standing because (as we discuss, below) neither one alleged an injury directly attributable to Kiewit.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondents respectfully request that this Court deny the petition for writ of certiorari.

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY RESOLVED THE SINGLE ISSUE PETITIONERS RAISE

The court below fully considered the question petitioners raise.[10] A15-19 (following *Holmes* and affirming dismissal because, "The direct harm in this case runs to the prime contractors. It was the intervening inability of

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[8] *See generally* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-75 (1982).

[9] Warth v. Seldin, 422 U.S. 490, 498. Of particular importance in this case, the litigant must satisfy "the 'causation' and 'redressability' prongs of Art. III minima by showing that the injury 'fairly can be traced to the challenged action' and is 'likely to be redressed by a favorable decision.' " Whitmore v. Arkansas, 459 U.S. 149, 155 (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)).

[10] Petitioners never briefed this issue of Clayton Act standing before the Ninth Circuit. They raised it for the first time at oral argument, based on a letter of supplemental authorities filed with the appellate court only days earlier.

the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries.").

The court below also decided that question correctly. Its conclusion is consistent with every applicable Clayton Act and RICO standing case this Court has decided.[11]

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977), this Court rejected plaintiffs' claim that the manufacturers' price fixing injured them, within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15, because the overcharges were "passed on" to them by the general contractors. This Court ruled that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . . " 431 U.S. at 729. This Court concluded,

> [O]n balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of " 'private attorneys general' " to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than

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[11] The *only* decisions of this Court that petitioners cited in support of their argument are Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983), a case in which this Court ruled that the plaintiff union *lacked* standing, and Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982). As we explain in this section the holding below does not contradict these decisions; both endorsed the bar against claims of "passed on" harm under the Clayton Act.

> by attempting to apportion the overcharge among all that may have absorbed part of it.

431 U.S. at 746.[12]

The injury alleged by plaintiffs in *Illinois Brick* was "passed on" from manufacturers to contractors, and from contractors to consumers. The consumers lacked standing:

> Petitioners manufacture and distribute concrete block in the Greater Chicago area. *They sell the block primarily to masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids for these projects to customers* such as the respondents in this case, the State of Illinois and 700 local governmental entities. . . . Respondents are thus indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching respondents.

431 U.S. at 726 (emphasis added). So too here: the potential subcontracts that petitioners in this case sought must also "pass[] through two separate levels in the chain of distribution before reaching" petitioners, *i.e.*, they must pass from the government to petitioners' preferred prime contractors, and then to petitioners themselves. Petitioners lack standing for the same reason that the indirect purchasers of concrete block in *Illinois Brick* lacked standing.

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[12] *Illinois Brick* was based on Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), in which this Court rejected an antitrust defense claim that indirect rather than direct purchasers were the parties injured.

In *Kansas v. Utilicorp United, Inc.*, ___ U.S. ___, 110 S.Ct. 2807 (1990), for the same reason, this Court precluded indirectly injured customers (or states on their behalf) from suing under the Clayton Act.

> We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with Hanover Shoe, Inc. v. United Shoe Machinery Corp. . . . and Illinois Brick Co. v. Illinois . . . , we hold that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4.

110 S.Ct. at 2810. The decision rejected plaintiffs' suggestion that an exception be made for cases involving regulated public utilities or situations that "resemble" cost-plus contracts.

In *Kansas v. Utilicorp United, Inc.*, the injury was passed on from suppliers to utilities, and utilities to consumers. The consumer states lacked standing:

> Like the State of Illinois in Illinois Brick, the consumers in this case have the status of indirect purchasers. *In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired* to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in Hanover Shoe and Illinois Brick, any antitrust claim against the defendants is not for them, but for the utilities to assert.

110 S.Ct. 2807, 2812 (emphasis added). Both petitioners here and the public utility customers there sought their

product – here, subcontracts, there gas – from a middleman, "not from the suppliers said to have conspired. . . ." These petitioners lack standing for the same reason that the derivatively injured consumers in *Kansas v. Utilicorp United, Inc.* lacked standing.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534-35, 544-45, this Court held that the plaintiff unions did not suffer compensable antitrust injuries by an employer association's coercion of third parties and employees, in spite of the complaint's allegation that the coercion towards those parties adversely affected the unions. The alleged injury was passed on by too many entities before it affected the plaintiff union.

In *Associated General Contractors*, the injury was passed on from a multiemployer association to general contractors and owners, and from contractors and owners to the plaintiff union. The union lacked standing:

> The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting. *The complaint alleges that defendants "coerced" two classes of persons: (1) landowners and others who let construction contracts, i. e., the defendants' customers; and (2) general contractors, i. e., defendants' competitors and defendants themselves.* Coercion against the members of both classes was designed to induce them to give some of their business – but not necessarily all of it – to nonunion firms.

459 U.S. at 527-28 (footnotes omitted) (emphasis added). In the present case, petitioners alleged that Kiewit

defrauded government agencies who let construction contracts. Under *Associated General Contractors*, an allegedly defrauded agency might have antitrust standing. That, however, does nothing to aid petitioners. These petitioners are neither the "landowners . . . who let construction contracts," nor the "general contractors" who sought such contracts; these petitioners are not "defendants' competitors." They are one step even more removed than the general contractors; they are potential subcontractors of those general contractors. They are one step even more removed than "defendant's competitors"; they are possible subcontractors to those firms. They are two steps more removed than the governmental agencies who "let construction contracts." Thus, these petitioners lack standing under *Associated General Contractors* because their position is akin to that of the union which attempted to claim standing – not akin to the position of the project owner.

The portion of *Associated General Contractors* that the petition quotes (at p. 16) does state that "subcontractors" can assert antitrust claims. But petitioners neglect to note that the subcontractors could assert a claim in that case solely because they alleged that the multiemployer association defendant directly harmed them by coercing its members to send their business directly to other subcontractors – not to other subcontractors via other prime contractors. 459 U.S. at 522-23 (quoting complaint's allegations). If petitioners here asserted a claim against Kiewit, as contractor, for wrongfully failing to hire them directly as subcontractors, then their quote from *Associated General Contractors* might be apt. But petitioners

asserted a claim against Kiewit for defrauding the government, depriving other prime contract bidders of work, and only thereby harming petitioners. The quote and the comparison to the subcontractors in *Associated General* is, therefore, inapt.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, this Court held that a subscriber who paid a psychologist had standing under § 4 of the Clayton Act to sue the plan for its failure to reimburse her. *McCready* reaffirmed the validity of *Illinois Brick* and *Hanover Shoe*'s rule against standing to allege an injury "passed on" by a direct purchaser. 457 U.S. at 474-75 & n.11. *McCready* held only that the subscriber in that case suffered a unique and distinct injury, not "passed on" by anyone:

> McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.

457 U.S. at 475 (footnote omitted).

In *McCready*, the plaintiff suffered harm because Blue Shield failed to pay her, directly. Blue Shield was not obligated to pay anyone else, who would then pay McCready. 457 U.S. at 475. No one else lost money on the

deal. The result is therefore the same under *McCready* as under *Illinois Brick*, *Holmes*, and the other cases discussed above. Petitioners' claims of harm are derivative of unsuccessful prime contractors' claims of harm and thus are barred by the "passing on" rule endorsed by all of those cases.

Petitioners' only claim of special injury, distinct from that of the unsuccessful prime contractors' loss, is that the alleged scheme targeted them, and not the prime contractors from which they sought work.[13] Under *McCready*, however, this is irrelevant:

> The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.

457 U.S. at 479.[14]

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[13] Petition p. 19, n.13 ("Unlike prime contractors, MWBEs were excluded from participating in public works projects precisely because of their status as MWBEs. The scheme diverted money that was earmarked for MWBEs to Kiewit's own pockets. To deny standing to the MWBEs is to deny a remedy to those most completely and most directly injured by the conduit scheme.").

[14] *Accord Associated General Contractors*, 459 U.S. at 537 ("We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss. Indeed, in McCready, we specifically held: 'The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.' ") (footnote omitted).

In *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S.Ct. 1311 (1992), this Court addressed whether RICO plaintiffs can use the "passing on" theory that antitrust plaintiffs cannot. The answer was no. The Securities Investor Protection Corporation (SIPC) alleged that Holmes "conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's statutory duty to advance funds to reimburse the customers." 112 S.Ct. at 1314. Relying on antitrust precedent, the *Holmes* decision explicitly rejected the argument that Congress did not intend RICO litigants to be burdened with the standing limitations prevalent in antitrust litigation.[15] Instead, this Court stated: "the reasons that supported conforming Clayton Act causation to the general tendency apply just as readily to the present facts, *underscoring the obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of § 1964(c).*" 112 S.Ct. at 1320 (emphasis added). Hence, this Court ruled that SIPC – or the customers in whose shoes it stood – lacked standing, because the customers were indirectly injured by damages sustained by their brokers. This Court explained: "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts . . . generally . . . stand[s] at too remote a distance to recover." *Holmes* at 1318 (citation omitted). Since petitioners complain of harm "flowing merely from

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[15] 112 S.Ct. at 1318 n. 15, *citing* 115 Cong. Rec. 6995 (1969) (ABA Comments on S. 2048).

the misfortunes visited upon" unsuccessful prime contractors, they also stand "at too remote a distance to recover."[16]

The decision below is consistent with all these Clayton Act and RICO decisions, because all comport with the general rule barring a plaintiff from asserting a claim of "passed on" injury. The real question petitioners raise is whether a new exception to the bar against asserting "passed on" claims of injury should be made for them. Petition p. 16, n.11 (listing reasons why petitioners' claim does not present a risk of duplicative recovery).[17] This is

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[16] In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), cited by petitioners (p. 15) in support of their claim, this Court rejected a "racketeering injury" requirement that some lower courts had added to § 1964(c). *Sedima* did not reject this Court's bar against assertion of "passed on" injuries. The portion of the *Sedima* dissent to which petitioners refer (Petition p. 12, n.7) acknowledges that *direct* competitors of a business that engages in racketeering activity to enhance profits can bring "civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts." 473 U.S. at 522. If petitioners were direct competitors of Kiewit, perhaps *Sedima*'s standing holding would benefit them. Petitioners, however, were not. They are disappointed potential subcontractors of a bidder that competed with Kiewit for a prime contract and lost. Neither petitioner has standing under *Sedima*.

[17] Although we believe it is inappropriate for this Court to consider whether to make an exception to the *Illinois Brick* passing on rule, we must also point out that petitioners err in claiming (Petition p. 16, n.11) that their case is a good one for such an exception (because it presents no risk of duplicative recovery). This case certainly does present the risk of duplicative recovery. Here, as in the cases discussed in text, other parties may sue. If an unsuccessful contractor or the government agency itself tries

a question that is particularly inappropriate for *certiorari*. The whole point of the direct purchaser limitation is to avoid embroiling the federal courts in such disputes:

> . . . The rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." Illinois Brick, 431 U.S., at 744. . . . The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.
>
> > "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the Hanover Shoe rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality." Id., at 744-45. . . .
>
> *In sum, even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.* Having stated the rule in Hanover Shoe, and adhered to it in Illinois Brick, we stand by our interpretation of § 4.

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to sue later – after petitioners – the risk of duplicative recovery arises. If an unsuccessful prime contractor tries to sue later, for itself and also for other subcontractors who competed against petitioners, the risk is present.

Kansas v. United Utilicorp, Inc., 110 S.Ct. 2807, 2817 (quotes and brackets in original) (emphasis added).

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE OTHER APPELLATE RICO OR ANTITRUST STANDING DECISIONS; THE ALLEGEDLY CONFLICTING DECISIONS INVOLVED DIFFERENT FACT PATTERNS

There is no conflict between the decision below and the decisions of the other Courts of Appeal. This is true of appellate court decisions under RICO and the Clayton Act.

Appellate courts have rejected the "passing on" theory when considering a private party's RICO standing to bring claims for damages caused by a fraud upon the government. They have ruled that private plaintiffs lack standing to sue a private defendant for a scheme to defraud the government.[18] Where, as here, a RICO claim

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[18] *See generally* O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (affirming dismissal of RICO claim alleging scheme to defraud the federal government by improperly obtaining federal student aid funds, because this fraud on the government was not the direct cause of these plaintiffs' loss of work opportunities); Brandenburg v. Seidel, 859 F.2d 1179, 1188 (4th Cir. 1988) (would be class of private civil plaintiffs sued private defendants, various savings and loan associations and related parties, alleging that "[a]s a result of defendants' violations of law, a run did take place on MSSIC institutions, including First Maryland, and First Maryland was unable to meet . . . its obligations to depositors. . . . " (*id.* at 1188); complaint dismissed because plaintiffs lacked standing to raise claim that the government entity supervising the savings and loans had been harmed); Carter v. Berger, 777 F.2d 1173 (7th Cir.

is brought by plaintiffs who also claim they suffered injury as a result of fraud on the government, the plaintiffs also lack standing.

Similarly, the appellate courts are virtually unanimous in dismissing private plaintiffs' RICO claims based on allegations that a defendant engaged in a fraudulent RICO scheme, and fired the plaintiff for refusing to go along with it. Such claims are dismissed for failure to allege standing, injury, or proximate cause.[19]

1985) (taxpayer/plaintiffs lacked standing to bring RICO claims against private defendants who bribed county tax board members to obtain favorable tax assessments; the county, the only party directly affected by the fraud, was the one with standing); United Fence & Guard Rail v. Royal Guard Fence, 765 F. Supp. 55, 57-58 (E.D. N.Y. 1991) (dismissing RICO claim by non-minority contractor against its MBE competitors alleging they were "fronts" which obtained state contracts through fraud, for failure to satisfy § 1964(c)'s causation requirement and failure to allege harm to a property right; "the scheme, assuming one existed, was designed to defraud the State and NYDOT, and was not intended to defraud plaintiff"); District Telecommunications Dev. Corp. v. District Cablevision, Inc., 638 F. Supp. 418, 422 (D. D.C. 1985) (dismissing private RICO claim because "plaintiff was not the prime target of any alleged fraud, but rather a third-party recipient of its effects").

[19] *E.g.*, Reddy v. Litton Indus., 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 332 (1991) (fired whistle blower "lacks standing to sue under § 1962(c)"); Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990) (plaintiff alleges loss of employment for failure to go along with employer's RICO scheme targeted at customers; complaint states no compensable RICO injury and plaintiff lacks "civil RICO standing"); O'Malley v. O'Neill, 887 F.2d 1557, 1561; Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 636-37 (2d Cir. 1989); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1214 (5th Cir. 1988); Pujol v. Shearson/American Express, Inc., 829

Another typical fact pattern involves allegations by employees or shareholders that they were harmed derivatively by a defendant's racketeering harm to their corporation. The courts are virtually unanimous in dismissing such RICO claims because the plaintiff is not the party directly injured.[20]

F.2d 1201, 1204-05 (1st Cir. 1987); Morast v. Lance, 807 F.2d 926, 932-33 (11th Cir. 1987).

[20] *See, e.g.*, Sanders Confectionary Products v. Heller Financial, 973 F.2d 474, 487 (6th Cir. 1992) ("When the acts alleged lower the corporation's value, the corporation suffers the direct injury, and the shareholders suffer as a result because their investment is worth less"; hence no shareholder standing to claim this loss under RICO); In re Sunrise Securities Litigation, 916 F.2d 874 (3d Cir. 1990) (depositors of savings and loan association in FSLIC receivership had no standing to sue association officers and directors because their injuries were derivative of association injury for which only receiver had standing to sue); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1179 (7th Cir. 1989) ("The standing rule that stockholders may not bring individual claims under RICO for diminution in the value of the corporation prevails in all the Circuits that have considered the matter."); Flynn v. Merrick, 881 F.2d 446 (7th Cir. 1989) (shareholders and debenture holders lack standing to sue for corporate injuries); Sparling v. Hoffman, 864 F.2d 635 (9th Cir. 1988) (affirming dismissal of RICO claim because neither shareholder nor employee of a corporation can maintain a RICO claim based on harm to the corporation); Roeder v. Alpha Industries, 814 F.2d 22, 29 (1st Cir. 1987) (affirming dismissal of shareholder fraud-based RICO claim for lack of standing); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986) ("[D]iminution in value of the corporate assets is insufficient direct harm to give the shareholder standing to sue in his own right"; dismissing RICO claim); Warren v. Manufacturers Nat'l Bank of Detroit, 759 F.2d 542 (6th Cir. 1985).

The lower court RICO cases cited by petitioners are distinguishable on their facts. Some of those RICO cases really stand for the unremarkable rule that a directly injured bidder can bring a claim against its direct competitor or, in certain circumstances, against the owner of the project.[21] None of those cases support petitioners' claim that a disappointed subcontractor of an unsuccessful bidder can sue a successful bidder.

Petitioners cited three RICO cases as examples of decisions that discard the "direct" or "indirect" injury inquiry. First, they cited *Zervas v. Faulkner*, 861 F.2d 823, 833 (5th Cir. 1988), Petition p. 21, for this new rule. Actually, in *Zervas*, the Fifth Circuit *reversed* a jury verdict

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In fact, in Holmes v. SIPC, 112 S.Ct. at 1321, this Court cited with approval Mid State Fertilizer v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1336 (7th Cir. 1989), which also held that shareholders who suffer injury derivative of their corporation have no standing to bring a RICO claim.

[21] In Anderson-Myers Co. v. Roach, 660 F. Supp. 106 (D. Kan. 1987) (Petition p. 14, n.9), for example, the plaintiff was the unsuccessful bidder and the claim was against the government, not a private party. In Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990), (Petition p. 13), the plaintiff was a direct competitor of the defendant, not a would-be subcontractor of a competitor of the defendant. In both Iconco v. Jensen Constr. Co., 622 F.2d 1291 (8th Cir. 1980) and Service Engineering Co. v. Southwest Marine, Inc., 719 F. Supp. 1500 (N.D. Cal. 1989) (Petition p. 14), each plaintiff was the second lowest bidder suing a direct competitor on a job that another business won under a small business set-aside. Further, neither *Jensen* nor *Service Engineering* applied this analysis to RICO claims – *Jensen* involved a claim solely under Iowa law, and *Service Engineering* involved a plaintiff who failed to allege a pattern of racketeering so the RICO claim was dismissed for that reason.

for plaintiffs on their RICO claims precisely because the connection between the injury and predicate act was not close enough. 861 F.2d at 835. Next, petitioners cited *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988), Petition p. 21, for this proposition. While *Bass* rejects the use of the words "direct" and "indirect" for determining whether plaintiffs had standing, 838 F.2d 10, 11, it used other words to come to the same conclusion as *Illinois Brick*, *Holmes*, etc., in rejecting claims of passed on injury. It affirmed dismissal of RICO claims brought by members of a union local against the local's president because the injuries alleged – operating the local as a racketeer influenced organization, for his own personal financial benefit – were suffered by the local, and not by individual members. "In short, the local – and not the plaintiffs – is the real party in interest to this RICO action." 838 F.2d at 13. Finally, they cited *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991), Petition p. 21, for this rule. In *Willis*, the court actually affirmed dismissal of a civil RICO claim. Citing the general rule that shareholders' and employees' harms are "incidental to the corporation's injury," 947 F.2d 998, 1001, the court ruled that this plaintiff's claim was "derivative in nature," *id.*, because the corporation was the immediately injured party and the plaintiff was injured only derivatively, as a stockholder and employee.

Thus, although these cases may reject the "direct" or "indirect" nomenclature, they all embrace the bar against "passed on" claims of injury. They are completely consistent with the decision below.[22]

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[22] Petitioners cite another case in support of their claim which, like Willis v. Lipton, actually stands for the rule that a

Other lower court RICO decisions relied upon by petitioners are distinguishable for a variety of other reasons.[23] None of the RICO decisions petitioners cite has

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plaintiff whose injury is derivative of a corporation's injury may not assert his own RICO claim. In Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (Petition, p. 20), the court did hold that Bankers Trust suffered an injury separate from, and not passed on by, the bankrupt corporation; it therefore suffered injury "directly," 859 F.2d at 1101, and could sue for that injury under RICO. This case explicitly recognized the continuing validity of the Second Circuit's holding in Rand v. Anaconda-Ericsson, 794 F.2d 843, *supra*, p. 18, n.20, that a shareholder of an injured corporation lacks standing to bring a RICO claim because the injury is derivative of the corporation's injury; the *Bankers Trust* decision simply found that holding inapplicable.

[23] Petitioners cite Terre du Lac Ass'n v. Terre du Lac, Inc., 772 F.2d 467, 472 (8th Cir.), *cert. denied*, 475 U.S. 1082 (1986) (Petition p. 20). In *Terre du Lac*, plaintiffs, a property owners' association, alleged that the developers of their subdivision failed to fulfill their promises to pave roads, complete sewage and water systems, etc. The appellate court held that the Association had standing to sue on behalf of its members, despite defendants' argument that "these allegations of injury are not sufficient to establish the Association's standing, since the Association does not allege that it was the target of the alleged mail fraud . . . " 772 F.2d at 472. That court did not reverse dismissal of any "passed on" injury, however; its only statement concerning this issue was a rejection of "defendants' argument that the Association lacks standing merely because it may pass its alleged injuries on to its members." *Id.* at 473. The only holding of Schiffels v. Kemper Financial Servs., 978 F.2d 344 (7th Cir. 1992) (Petition p. 19), was that a plaintiff alleging a RICO conspiracy, § 1962(d), need not allege injuries resulting from predicate acts of racketeering – injury from an overt act of the conspiracy will do; the court still went on to state that Schiffels only "has standing to sue under RICO if her complaint alleges an injury to her business or property proximately caused by an

held that RICO plaintiffs can evade the bar against asserting "passed on" claims of injury.

The appellate antitrust cases petitioners cited are also distinguishable. Some are simply irrelevant to the question petitioners present.[24] Others apply to different facts than those presented here. For example, petitioners cited some antitrust cases for the rule that two entities, not just one, can sometimes assert antitrust claims against the same defendant without running afoul of the "passing on" rule. Petition pp. 17-18. This is certainly true, where neither plaintiff's claim is "passed on" by the other.[25]

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over act in furtherance of a conspiracy to violate RICO," and that her complaint appeared deficient in several respects.

[24] For example, they cite Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 730 (3d Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) and Parks v. Watson, 716 F.2d 646, 659-60 (9th Cir. 1983), antitrust cases, in support of their claim that "loss of a business opportunity" is loss of a sufficiently definite property right to establish standing. Petition, pp. 10-11. The court below did not affirm dismissal solely due to failure to allege a property right; in the only ruling Petitioners challenge, the court below affirmed dismissal because, no matter what kind of property right was claimed, the injury was too attenuated because it was passed on by the directly injured prime contractors.

[25] In Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1947 (1992) (Petition, p. 17), for example, the court held only that consultants who offered advice to businesses on advertising effectively and cheaply in the yellow pages had standing to bring an antitrust claim against GTE, for adopting a policy that tended to force the consultants out of the market – because all the consultants were *direct* competitors of defendant GTE in the exact same market. The decision's subsequent *dicta*, 951 F.2d at 1163, that advertisers might have standing to sue

That is not the case here, however. Petitioners cited no decision that would allow plaintiffs with such an attenuated claim of entitlement and complex chain of causation to sue.

III. THE QUESTION PRESENTED IS MOOT BECAUSE DISMISSAL WAS APPROPRIATE FOR OTHER REASONS, ALSO

The question presented is moot because dismissal of the RICO claim was appropriate for other reasons. First, harm to a property right is an element of a RICO claim based on mail fraud.[26] Washington law is clear[27] that

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GTE also, only shows that in certain cases a defendant's wrongful acts can harm two separate parties directly. This is not such a case. In Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (Petition p. 18), the court held only that the LA Raiders and the LA Coliseum both had standing to sue the NFL for antitrust violations – *i.e.*, the application of territorial restrictions arising from the Raiders' move from Oakland. Neither plaintiff's harm was derivative of the other's "the NFL's territorial restraints in this case not only impaired competition between NFL football team franchises [like the Raiders], but also restrained competition in the 'stadia market' between rival stadia (such as the Oakland Coliseum and the LA Coliseum) that seek to secure NFL tenants." 791 F.2d at 1365.

[26] *See* 18 U.S.C. § 1964(c) (requiring harm to "business or property" to state a RICO claim); United States v. McNally, 438 U.S. 350 (1987) (the federal mail fraud statute is "limited in scope to the protection of property rights").

[27] "[W]hether a particular interest amounts to property is quintessentially a question of state law." Doe v. Roe, 958 F.2d 763, 768 (7th Cir. 1992). *Accord* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

there is no property right in the mere desire to receive a subcontract – there must be a valid contract or other legally enforceable claim.[28] *See* A14-15 (affirming dismissal for lack of standing, because Washington law is clear that even a contractor's bid for a prime contract from a government agency is not binding and is not a contract; *a fortiori* a subcontractor's desire to receive a subcontract, for which the subcontractor did not bid and did not receive an acceptance, from a losing prime contractor, is not property or a contract either).[29] Thus, the

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[28] Pleas v. Seattle, 112 Wash. 2d 794, 800-02, 774 P.2d 1158 (1989) (tort of intentional interference requires "existence of valid contractual relationship or business expectancy"); Hoffer v. State, 110 Wash. 2d 415, 432, 755 P.2d 781 (1988) (same); Broten v. May, 49 Wash. App. 564, 568-69, 774 P.2d 1085 (1987), *review denied*, 110 Wash. 2d 1003 (1988).

[29] Federal law gives losing bidders for government contracts no right to have their bids accepted, either. Federal regulations provide a detailed scheme for raising the plaintiffs' complaints. None of these procedures, however, includes the sequence of events that the petitioners claim necessarily would have occurred if the purported "conduits" were stripped of their MWBE certification. *See, e.g.*, 49 CFR 23.73 (complaint procedure; no provision for awarding subcontracts to other MBE firm); 49 CFR 23.55(a) (procedure by which third party may challenge MBE's certification; no provision for award of challenged MBE's subcontract to another prime contractor's "designated" MBE); 49 CFR 23.69 (procedure for challenging DBE status; no procedure for substituting other DBEs). *See also* 23 CFR 635.114(f) (for state to reject Kiewit's low bid, it must have the concurrence of the Federal Highway Administration (FHWA)); 23 CFR 635.114(g) (if the state then decides to award to the second-lowest bidder, the FHWA would have to concur in that decision, and FHWA has discretion in deciding whether or not to concur, see Glasgow, Inc. v. Federal Highway Administration, 843 F.2d 130 (3d Cir. 1988)).

complaint was properly dismissed by the district court for failure to allege harm to a property right.[30]

Second, reliance is an element of RICO claims based on mail fraud.[31] Petitioners allege a RICO claim based on mail fraud, but they fail to allege that they themselves ever relied on any purported fraud by Kiewit.[32] The RICO claim was deficient for this reason also.[33]

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[30] *See* Order, p. 5, CR:88, A28.

[31] *E.g.* Pelletier v. Zweifel, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 167 (1991) ("when the alleged predicate act is mail or wire fraud, the plaintiff . . . must have relied to his detriment on misrepresentations made in furtherance of that scheme"); O'Malley v. O'Neill, 887 F.2d 1557, 1563; Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10; Blount v. Financial Servs. Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987) (to properly allege mail fraud as civil RICO predicate, plaintiff must state not just the false statement defendant made, but also the fact that plaintiff relied upon that false statement of fact); Flowers v. Continental Grain Co., 775 F.2d 1051, 1054 (8th Cir. 1985) (same).

[32] The only allegation even vaguely related to this issue is Amended Complaint paragraph 26's assertion, "Government administrators review the reports and representations in question on behalf of and for the benefit of legitimate MWBEs. . . . " Even if this were true, it fails to show that the petitioners relied upon Kiewit's purported fraud.

[33] Neither the district court nor the Ninth Circuit reached the issue whether the amended complaint was also deficient for failing to allege a RICO "enterprise" or "pattern of racketeering." Petitioners' failure to allege these additional elements of a § 1962(c) violation is clear from the amended complaint, however, and would have formed an appropriate basis for dismissal, also.

IV. PETITIONERS MISSTATE CERTAIN FACTS RELEVANT TO THIS COURT'S EXERCISE OF CERTIORARI JURISDICTION

Petitioners state, "In numerous instances, petitioners were identified as subcontractors on the lowest bid in compliance with the set-aside regulations but were excluded from participating in those public works projects as a *direct consequence* of Kiewit's unlawful scheme." Petition p. 5 (citing A4) (emphasis added).[34]

There are two errors here. First, petitioners never pled that they had binding subcontracts to do any of the work identified in the amended complaint. All the amended complaint states is that each petitioner was "designated" by a second or third place bidder on one of the public works projects listed.[35] Second, petitioners'

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[34] Similarly, petitioners claim (at p. 3), "The successful bidder receives a condition of Award letter that makes the participation of the designated MWBEs a *condition of the contract* between the successful bidder and the government agency," citing A2 (emphasis added). The amended complaint's actual allegation on this point is: "The low bidder receives a Condition of Award letter from the government agency owning the project that incorporates the set-aside requirements on the project and the MWBEs that the prime contractor will use to meet the requirements." Amended Complaint, CR:59, paragraph 15.

[35] Actually, the petitioners never allege that the law required the losing contractors to use the MWBEs that they "designated." Paragraph 32 alleges that Imagineering was "designated" as a WBE by the third lowest bidder on some unspecified portion of the West Seattle Low Bridge. It does not allege a commitment between the two firms, and there is no allegation that a "designation" in a bid proposal is binding. In fact, there is no allegation that Imagineering did anything to

preferred prime contractors never had any right to receive the prime contracts from the government. *See* A14-15. Hence, petitioners' purported "exclu[sion]" from participation in public works projects was not a "direct consequence" of the fraudulent scheme alleged.

Petitioners also misstate the facts when they claim that they alleged the injury of exclusion from the "public works construction market" below. Petition p. 7 (citing A5). The amended complaint contains no allegation of exclusion from market share.[36]

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become designated or even knew that it had been designated at the time. Similarly, paragraph 33 alleges that Morrison-Knudsen should have been the prime contractor on the Cedar Falls Dam contract, and Knighten Brothers was "designated" by the second low bidder on the Cedar Falls Dam contract. Again, there is no allegation of a commitment between the two firms, and there is no allegation that a "designation" in a bid proposal is binding. In fact, there is no allegation that petitioner did anything to become designated or even knew that it had been designated at the time.

[36] *Cf.* amended complaint ¶ 17 (listing four types of injuries the purported "conduit scheme" accomplishes, but failing to list petitioners' exclusion from market share).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

IRWIN H. SCHWARTZ
(Counsel of Record)
710 Cherry St.
Seattle, WA 98104
(206) 623-5084

SHERYL GORDON MCCLOUD
1111 3rd Ave., Suite 1060
Seattle, WA 98101
(206) 224-8777

Supreme
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No. 92-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court,
FILE
MAR 17 1993
OFFICE OF THE CLERK

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,

Petitioners

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

REPLY BRIEF OF PETITIONERS

Edmund J. Wood
WOOD & JONES, P.S.
1201 Westlake Center
Seattle, WA 98101-1625
(206) 623-4382

J. Michael Hennigan
Richard T. Colman
Jerrold J. Ganzfried
(Counsel of Record)
David S. Sager
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Imagineering Inc.
and Knighten Bros. Construction, Inc.

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REPLY BRIEF OF PETITIONERS

The petition explained why this case raises important, recurrent questions regarding the pleading requirements of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1964(c). In the decision below, the court of appeals erected substantial

new barriers to RICO standing that do not exist under the identical language of the Clayton Act, 15 U.S.C. § 15. Respondents' belabored defense of the judgment below does little to dispel the conclusion that the lower courts are adrift without this Court's guidance. Indeed, respondents' submission confirms the need for further review by this Court in two significant respects. First, respondents' principal defense of the decision below relies on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), a case neither cited nor discussed by the Ninth Circuit. Respondents' protracted argument on this point underscores that the decision below cannot stand on its stated terms.

Second, respondents' overly simplistic contention, based on *Illinois Brick*, that those who suffer "direct" injury have RICO standing while those who suffer "indirect" injury do not, merely masks the critical issue presented by the petition. Respondents' submission offers nothing more than the truism that a plaintiff whose injury is proximately caused by the defendant has standing, but a plaintiff whose injury is not proximately caused lacks standing. As the petition explained, the issue dividing the lower courts is not over the correct disposition of a case once the appropriate label has attached. Rather, the operative conflict in this area of the law is on how claims are to be characterized in the first instance, before the case-dispositive label attaches. By substituting labels for analysis, the brief in opposition highlights precisely where the instructive guidance of this Court would be most beneficial.

1. Respondents' argument that *Illinois Brick* bars petitioners' claims employs an invalid analogy and a mischaracterization of the complaint. The "passing on"

defense recognized in antitrust price-fixing cases does not apply to the injury suffered by petitioners as a result of their exclusion from the public construction market.

This case was brought on behalf of a class of minority- and women-owned business enterprises (MWBEs) excluded from participating in public construction projects as a direct result of Kiewit's unlawful scheme to circumvent minority set-aside requirements and to obtain contracts by subterfuge. MWBEs, the intended beneficiaries of the set-aside provisions, suffered injury in two principal ways. First, respondents' fraudulent scheme totally foreclosed legitimate MWBE participation in contracts awarded to and performed by respondents.[1] Second, respondents' fraudulent scheme precluded legitimate MWBE participation in contracts that, but for the fraud, would have been awarded to lower-priced, complying bidders.[2] In their brief in opposition, respondents' address only the latter form of exclusion, which they label "indirect" and thus dismiss as incapable of conferring standing. But respondents ignore the former

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[1] Rather than comply with the governing set-aside regulations, respondents opted to shut MWBEs out of the process by utilizing conduits, pass-throughs and fronts. Petitioners' initial complaint identified 11 public works contracts obtained by respondents without compliance with set-aside regulations. Complaint, ¶ 18, CR:1. The complaint further alleged that petitioners had submitted bids to respondents for subcontract work on such projects (*id.* at ¶¶ 28, 29) and that respondents' unlawful scheme "reduces the opportunity for legitimate [MWBEs] to participate with public works contracts awarded to [respondents]." *Id.* at ¶ 13.

[2] Petitioners' amended complaint alleged specific public works contracts awarded to respondents on which petitioners were expressly identified on bids submitted by the lowest-bidding prime contractor that complied with set-aside requirements. Pet. App. A4, A26.

type of exclusion, which even under their terminology would constitute "direct" injury and would confer standing. Equally as important for present purposes, respondents' "passing on" analysis is irrelevant to claims of exclusion and particularly so with respect to the direct type of exclusion alleged in this case.[3]

Illinois Brick arose, and has been applied, in antitrust price-fixing cases where indirect purchasers sought to measure their damages by the amount of the unlawful overcharge "passed on" to them. Unlike *Illinois Brick* and its progeny, however, this case does not involve allegations of price-fixing or multiple claims for the same overcharge by successive purchasers in a vertical chain of distribution. This case does not involve overcharges at all, and thus does not raise the concerns that were central to the holding of *Illinois Brick*. Rather, petitioners' claims are based upon their exclusion from participation in the public construction market. Petitioners have suffered a unique and distinct injury -- their exclusion from business -- as a direct result of respondents scheme to circumvent the set-aside regulations. The injury suffered by the proposed class of MWBE subcontractors was not "passed on" by anyone. In *Blue Shield v. McCready*, 457 U.S. 465, 474 (1982), this Court recognized the limited scope of *Illinois Brick* in terms that are fatal to respondents' contentions.

Even in the antitrust arena in which *Illinois Brick* arose, the "passing on" theory has no application to market exclusion claims analogous to petitioners' RICO claims.

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[3] Petitioners' complaints were dismissed under Rule 12, Fed. R. Civ. P., and prior to discovery. All allegations of the complaints must be taken as true in these proceedings.

Nor does this case implicate any of the judicial administration concerns this Court expressed in *Illinois Brick*. There is no issue of apportionment of the same damages among numerous potential plaintiffs; each petitioner is suing for its own unique, direct injury. There is no issue of duplicative or inconsistent damage awards; no one else can sue as an injured MWBE subcontractor. And, even if these concerns were relevant to this case, the class action mechanism would permit appropriate, consistent resolution of damages issues in a single proceeding.

The ease with which respondents transform *Illinois Brick* into a catch-all preclusion of all arguably complex damage calculations, and of all arguably "indirect" injuries in non-price RICO cases, amply demonstrates the need for this Court's intercession.

2. Another indication of the necessity for further review is respondents' effort to read the word "business" out of the statutory phrase "business or property." 18 U.S.C. § 1964(c).

There is no doubt that exclusion or foreclosure from competition constitutes injury to business within the meaning of the Clayton Act.[4] The same result should obtain within the meaning of the identical words in RICO,

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[4] *See Central Telecommunications, Inc. v. TCI Cablevision*, Inc., 800 F.2d 711, 727 (8th Cir. 1986) (loss of business opportunity constitutes injury to business under antitrust law), *cert. denied*, 480 U.S. 910 (1987); *Parks v. Watson*, 716 F.2d 646, 659-60 (9th Cir. 1983) (party who is precluded from entering industry has suffered an ascertainable loss).

and this Court has so stated.[5] Subsequent to the filing of the petition for a writ of certiorari in this case, the Eighth Circuit reconfirmed that, contrary to the decision below, allegations of lost business opportunity due to defendants' RICO violations satisfy the injury requirement for RICO standing. *Bieter Co. v. Blomquist*, No. 92-2018, 993 WL 59170, at *9 (8th Cir. filed Mar. 8, 1993). The Eighth Circuit stated (*id.*):

> Defendants argue that this is simply a lost opportunity, not the sort of actual, concrete injury for which RICO was designed. We do not question that the precise degree of [plaintiff's] injury is somewhat speculative, but it is simply the periphery, and not the core, which we so describe. [Plaintiff] was injured.

The conflict that existed among the courts of appeals when the petition was filed has thus become even more pronounced, creating even greater uncertainty on the question whether allegations of lost business opportunity are sufficient to satisfy the injury requirement of RICO

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[5] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.15 (1985) (enhanced commercial position of competitors gained by unlawful activity may give rise to RICO action); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988) (plaintiff sufficiently alleged injury for purposes of RICO standing despite defendants' argument that plaintiff failed to plead that it would have received the contract but for defendants' illegal conduct), *aff'd on other grounds*, 493 U.S. 400 (1990).

standing. Review by this Court is necessary to resolve that conflict.[6]

Because respondents' unlawful scheme was directed at circumventing set-asides and excluding MWBEs from participation in public works projects, the decision below denies a remedy to the parties most directly and clearly injured by the RICO violations alleged in the pleadings. The pretextual rationales advanced by respondents demonstrate that unless the decision below is reversed, the remedy Congress prescribed will be denied by substituting the superficiality of labels for the substance of analysis and accurate classification.

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[6] There is no merit to respondents' contention that petitioners lack Article III standing to assert their RICO claims. Respondents confuse the constitutional aspect of standing with the statutory aspect of standing. In any event, if there is an issue in this case concerning Article III standing to challenge abuses of set-aside requirements, then the correct disposition would be to hold this case pending this Court's decision in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, No. 91-1721, which was argued on February 22, 1993.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Edmund J. Wood
WOOD & JONES, P.S.
1201 Westlake Center
Seattle, WA 98101-1625
(206) 623-4382

J. Michael Hennigan
Richard T. Colman
Jerrold J. Ganzfried
(Counsel of Record)
David S. Sager
HOWREY & SIMON
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 783-0800

Attorneys for Imagineering Inc. and Knighten Bros. Construction, Inc.

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